IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES,

Petitioner,

—v.—

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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DOCKET—INDIAN CLAIMS COMMISSION

FILINGS—PROCEEDINGS—APPEARANCES

Contract No. 167 Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS

Attorney of Record:

ERNEST L. WILKINSON
National Grange Bldg., 9th Floor
1616 H St. N. W.
Washington 6, D. C.

* * * *

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Date filed	
Aug. 10, 1951	20 copies of petition filed, with ack. of service.
	* * * *
May 29, 1956	Answer filed.
Jun. 22, 1956	Motion for limited summary judgment as to 2nd & 3rd defenses filed by claimant.
	* * * *
Nov. 4, 1960	Order overruling motion for limited S.J. alternatively motion to strike the "second defense" and the "third defense" (J-774)
	* * * *
May 17, 1963	Petitioner's proposed exhibits 1 through 22.
May 20, 1963	Dfnt's proposed exhibits 1 through 18.
May 20, 1963	Dfnt's proposed exhibit No. 19 (Supplement).
June 12, 1963	Petitioner's Exceptions to Dfnt's Accounting.
	* * * *
Sept. 30, 1963	Ptr's First Amendment to Exceptions to Defendant's Accounting.

Date filed	
Oct. 3, 1963	Dfnt's proposed rebuttal exhibits 14a, 14b, 20 and 21.
	* * * *
Oct. 29, 1963	Transcript of hearing held Oct. 8, 9, 1963. (pp. 1-184). (Ipp 1-184)
	* * * *
Feb. 18, 1964	Ptr's Proposed Findings of Fact conclusions of Law and Brief on *Liability*
	* * * *
Aug. 11, 1964	Dfnt's Requested Findings of Fact, Objections and Brief on *Liability*.
	* * * *
Sept. 9, 1964	Ptr's Objections to Dfnt's Findings of Fact and *REPLY BRIEF*.
Sept. 14, 1965	Ptr's motion for leave to file additional exhibit No. 27.
Sept. 17, 1965	Order admitting additional evidence, Ptr's Exhibit 27. (J-1027).
Sept. 23, 1965	Ptr's Exhibit 28 (GAO Report) received in evidence at hearing this date.
Nov. 1, 1965	Ptr's Supplemental Memorandum re Accounting Issues.
	* * * *
Nov. 8, 1965	Dfnt's Response to Ptr's Supplemental Memorandum re accounting issues.
Nov. 8, 1965	Transcript of Argument, which was held Sept. 23, 1965. (pp 1-66).
	* * * *
May 6, 1966	First Interlocutory Order and Opinion of the Commission. *Findings of Fact*
Aug. 4, 1966	Defendant's Notice of Appeal from the Interlocutory order of the Indian Claims Commission filed May 6, 1966, determining liability. Copy of Appeal sent to Wilkinson Firm.

Date filed	
Sept. 1, 1966	Receipt from the U. S. Court of Claims on Record on Appeal.
	* * * *
Oct. 24, 1966	Supplemental Record on Appeal sent to U. S. Court of Claims.
May 16, 1967	Order dated May 15th, 1967 from the U. S. Court of Claims remanding case to the Indian Claims Commission with instructions to hear additional evidence and to make and report to the U. S. Court of Claims Findings of Fact.
Oct. 16, 1967	Order from the United States court of Claims denying appellant's motion for rehearing and appellee's motion to vacate order of remand.
Mar. 20, 1968	Petitioner's Motion for an Order calling on the Department of Justice to produce documents.
Mar. 22, 1968	Supplement to Defendant's Digest of Exhibits and Defendant's Exhibits 22 and 23.
	* * * *
Apr. 15, 1968	Motion of Defnt's Objections to Ptr's Motion for order calling on the Department of Justice to Produce Documents.
Apr. 17, 1968	Order Requiring Production of Documents and Instituting Investigation.
Apr. 22, 1968	Transcript of hearing on Argument held April 17, 1968, 1 Vol.
	* * * *
May 2, 1968	Commission's Order admitting affidavit in evidence subject to cross-examination of affiant by the parties. (J-1108)
May 24, 1968	Certificate of Counsel and Digest of Pertinent Material from Case No. 46640 Submitted by W. Braxton Miller from Justice Dept.

Date filed	
May 24, 1968	Response of Dfnt's to Order of the Commission Requiring Production of Documents and Instituting Investigation.
Nov. 7, 1968	Ptr's Proposed Additional Findings of Fact submitted.
Dec. 16, 1968	Dfnt's Request for Additional Findings of Fact under special Order of the Court of Claims, Objections to Findings Proposed by Petitioner and Brief.
	* * * *
Feb. 7, 1969	Ptr's Objections to Dfnt's Requested Findings of Fact and Reply to Objections.
June 27, 1969	ADDITIONAL FINDINGS OF FACT and ORDER TRANSMITTING FINDINGS OF FACT TO THE COURT OF CLAIMS.
	* * * *

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

Appeal from the Indian Claims Commission, Dkt. No. 328

For Pltf.:

GLEN A. WILKINSON
1616 H Street, N. W.
Washington, D. C. 20006
Atty. of Appellee

For U. S.:

W. BRAXTON MILLER
For Appellant

Petition Filed Aug. 26, 1966

Date	Proceedings
Aug. 26, 1966	Record on appeal from the Indian Claims Commission filed. (Ind. Cls. Dkt. No. 328). Parties notified. (Appeal by U. S., No. fee).
Oct. 24, 1966	Brief of United States (Appellant) filed. Copies (10) to appellee.
Oct. 26, 1966	Supplement to Record on Appeal filed. Parties notified.
	* * * *
Dec. 30, 1966	Appellee's brief filed. Copies (10) to appellant.
	* * * *
Feb. 9, 1967	Appellant's reply brief filed. Copies (10) to appellee.
May 1, 1967	Argued and submitted on appeal.

Date	Proceedings
May 15, 1967	Court entered order remanding the case to the Indian Claims Commission with instructions at set forth in the order. Copy to parties and to Indian Claims Commission.
June 13, 1967	Appellant's motion for rehearing filed. Copies (2) to atty.
June 14, 1967	Appellee's motion to vacate order of remand filed. Copy to appellant.
June 29, 1967	Appellant's response to appellee's motion to vacate filed. Copies (2) to appellee.
Oct. 9, 1967	Court entered order denying appellant's motion for rehearing and appellee's motion to vacate order of remand and deleting and vacating words and punctuation appearing in the order entered May 15, 1967, as set forth therein. Copy to parties and to Indian Claims Commission.
July 17, 1969	Additional findings of fact of Indian Claims Commission filed by Clerk of the Commission. Parties notified.
Sept. 4, 1969	Appellant's motion to set case for additional argument filed. Copies (4) to appellee. ALLOWED SEP 15 1969 and set for argument on the November, 1969, calendar.
	* * * *
Sept. 11, 1969	Appellee's response to motion to set case for additional argument filed. Copies (3) to appellant.
Sept. 16, 1969	Appellee's motion for leave to file supplemental citations of authority filed. Copies (3) to appellant. ALLOWED SEP 30 1969.
Sept. 30, 1969	Appellee's supplemental citations of authority filed. Copies (3) to appellant.

Date	Proceedings
Oct. 21, 1969	Supplemental record on appeal (contained in one accordian-type envelope) filed. Notice to parties.
Nov. 3, 1969	Argued and submitted on appeal from the Indian Claims Commission. Notice to I.C.C.
Mar. 20, 1970	The decision of the Indian Claims Commission is affirmed as to the taking claim and as to the accounting claim, with the exception set forth in the opinion, and the case is remanded to the Commission for approval of the amount of compensation due in accordance with the opinion. Opinion by Judge Nichols. Dissenting opinions by Judge Skelton and Chief Judge Cowen.
May 28, 1970	Appellant's request for writ of certiorari filed. Copies (5) to appellee.
Aug. 12, 1970	Notice of filing in the Supreme Court of the United States of petition for certiorari on August 10, 1970, No. 515, October Term, 1970. Notice to I.C.C.
Nov. 19, 1970	Order of the Supreme Court dated November 16, 1970 allowing certiorari filed. (Request for transmittal of record contained in covering letter from Supreme Court Clerk).
Nov. 25, 1970	Record in re certiorari forwarded to Clerk, Supreme Court of the United States. (No fee—U.S.)

[Title Omitted in Printing]

BEFORE THE INDIAN CLAIMS COMMISSION

No.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

Petitioner, the Southern Ute Tribe or Band of Indians, respectfully represents:

1. *Petitioner:* The petitioner is a tribe or band of Indians maintaining an organization known and recognized by defendant as the Southern Ute Tribe of the Southern Ute Reservation, whose members reside generally on the Southern Ute Reservation in Colorado.

2. *Statutory Authority for Suit:* This petition is filed under and pursuant to the Act of August 13, 1946 (60 Stat. 1049), conferring jurisdiction on the Indian Claims Commission to hear and adjudicate claims of tribes, bands or identifiable groups of American Indians against the United States, and the claims herein are asserted under Section 2 of said act.

3. *Attorneys' Contract:* Petitioner has entered into a contract with Wilkinson, Boyden & Cragun, a law partnership composed of Ernest L. Wilkinson, John S. Boyden, John W. Cragun and Glen A. Wilkinson, to prosecute its claims against the United States, which contract has been duly approved by the Commissioner of Indian Affairs, for and in behalf of himself and the Secretary of the Interior, as required by law, and is in full force and effect.

4. *Claims Not Pending:* No claim asserted herein, nor any part thereof, is included in any suit pending in the

Court of Claims or in the Supreme Court of the United States, and no claim asserted herein, nor any part thereof, has been filed in the Court of Claims under legislation in effect August 13, 1946, the date of approval of the Indian Claims Commission Act.

5. *Petitioner Sole Owner of Claim:* Petitioner is and always has been the sole and absolute owner of the claims asserted herein and no person or persons other than petitioner has ever had any interest therein. No assignment or transfer of any claim or claims set out herein, nor of any interest therein, has been made. Petitioner has not been paid for any claim or claims asserted nor any part thereof, except as hereinafter set forth, and is justly entitled to recover therefor from the United States, after the allowance of any credits or set-offs.

6. *Defendant Owes Fiduciary Duty:* At all times mentioned in this petition, defendant was the guardian and trustee of the property and affairs of the petitioner; as such defendant was subject to a high degree of fiduciary obligation and was required to deal fairly and honorably with petitioner, its property and property rights.

7. *Prior Action by Congress:* No action has been taken by Congress, nor by any of the departments of defendant, with respect to the claims herein asserted, except that Congress by Act of August 13, 1946 (60 Stat. 1049) provided a forum for the litigation of said claims.

8. *Unlawful Disposal of Land and Failure to Account:*

a. By Act of Congress of June 15, 1880 (21 Stat. 199), the Confederated Bands of Ute Indians, which included petitioner, ceded to the United States "all the territory of the present Ute Reservation in Colorado," composed of nearly 16,000,000 acres of land, except "the unoccupied agricultural lands on the La Plata River" on which members of the petitioner agreed to "remove and settle" and which was to constitute a reservation for petitioner.

b. By Section 3 of the Act of Congress of February 20, 1895 (28 Stat. 676), the reservation promised to petitioner by the Act of June 15, 1880, *supra*, was described as follows:

"* * * there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fiteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved."

c. The reservation described in paragraph 8b contained approximately 1,075,000 acres. By proclamation of the President of April 13, 1899 (31 Stat. 1947), in accordance with the provisions of the Act of February 20, 1895, *supra*, approximately 523,079 acres of that reservation were opened to settlement and disposal under the public land laws, and approximately 157,641 acres were set aside in a schedule of legal descriptions thereto attached for the selection of allotments by the Indians. The approximately 523,079 acres opened to settlement and disposal are described in said proclamation as follows:

"* * * Beginning at the point established by S. S. Gannett, Special Indian Agent, in June, 1897, at the intersection of the 107th meridian and the 37th parallel of latitude; thence north 15 miles along the eastern boundary of the reservation; thence westerly along the north boundary of the Southern Ute Indian Reservation to its intersection with the range line between ranges thirteen and fourteen west of the New Mexico Principal Meridian; thence south fifteen miles on said range line to the south boundary of the State of Colorado; thence easterly along the south boundary of the State of Colorado to the place of beginning."

Under the Act of February 20, 1895, *supra*, the lands within the area so described could be disposed of under the desert, homestead and townsite laws and under the coal, mineral, stone and timber laws, except that no homestead settlers should receive title to any portion of such lands at less than $1.25 per acre.

d. Under the Act of February 20, 1895, *supra*, from the moneys realized from the sale of said lands, there was to be paid to the Indians in the manner provided therein the sum of $50,000; an additional $20,000 was to be invested in sheep to be divided per capita among the Indians; an additional $2,000 was to be paid to certain chiefs of the tribes and "the balance of the money realized from the sale of the lands, after deducting expenses of sale and survey," was to "be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians."

e. Purporting to act under the authority of the aforesaid acts and proclamation, or otherwise, defendant thereafter unlawfully disposed of the following acreages of land, comprised within the area of the approximately 523,079 acres referred to in paragraph 8c hereof, for which petitioner is informed defendant received no compensation and consequently made no accounting to petitioner:

Free Homesteads	219,037.39 acres, more or less
Soldiers' Additional Homesteads	480.51 acres, more or less
Other Reservations of Land	360.00 acres, more or less
Homestead Applications	617.27 acres, more or less
	220,495.17 acres, more or less

f. In addition, defendant has disposed of the following acreages of land comprised within the area of the approximately 523,079 acres enumerated in paragraph 8c hereof, for which petitioner is informed defendant received proceeds in an amount unknown to petitioner but known to defendant, of which defendant has made no accounting to petitioner:

Desert Entries	45,452.43 acres, more or less
Timber and Stone Entries	18,203.78 acres, more or less
Cash Entries	16,340.59 acres, more or less
Isolated Tracts	1,407.87 acres, more or less
Public Sales	468.51 acres, more or less
Coal Cash Entries	80.00 acres, more or less
	81,953.18 acres, more or less

g. From the approximately 157,641 acres referred to in paragraph 8c hereof (set aside for allotments), approximately 63,045.61 acres were allotted to the Indians, leaving approximately 94,596.39 acres unallotted.

h. From the approximately 523,079 acres referred to in paragraph 8c hereof (set aside for settlement and disposal under the public land laws), approximately 220,630 acres were not sold or entered under the public land laws.

i. By an order of the Secretary of the Interior of September 14, 1936, acting under authority of Section 3 of the Act of June 18, 1934 (48 Stat. 984), all the unallotted and undisposed of lands offered for settlement and entry, containing approximately 315,227 acres, were restored to and made part of the Southern Ute Reservation.

9. *Damages:*

a. The disposal of the approximately 220,495.17 acres of land by defendant was in violation of the Acts of June 15, 1880 and February 20, 1895, and the proclamation of the President of April 13, 1899 constituted a taking of said land, resulting in damage to petitioner in an amount equivalent to the value of said land at the time of taking together with a sum sufficient to compensate petitioner for the damage resulting from the delay in payment.

b. The disposal of the approximately 220,495.17 acres of land by defendant, contrary to the aforesaid statutes and proclamation, constituted unfair and dishonorable conduct on the part of defendant and caused damage to petitioner in an amount equivalent to the value of said land at the time of taking together with a sum sufficient to compensate petitioner for the damage resulting from the delay in payment.

c. Defendant's failure to account for the proceeds from approximately 81,953.18 acres disposed of as set forth in paragraph 8f was in violation of the aforesaid statutes and proclamation and the obligation imposed upon a trustee, and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.

d. Defendant's failure to account for the proceeds from the sale of approximately 81,953.18 acres constituted unfair and dishonorable conduct on the part of defendant, and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.

10. WHEREFORE, petitioner prays that judgment be awarded to it under categories (1), (3) and (5) of Section 2 of the Act of August 13, 1946, *supra*, for an amount which will provide fair and just compensation for the approximately 220,495.17 acres of land unlawfully disposed of by defendant, and that defendant be required to render a true, complete and proper accounting for the proceeds received by it from the disposal of the approximately 81,953.18 acres of land, less any proper credits or set-offs, and for such other and further relief as the Commission may deem fair and equitable.

Respectfully submitted,

ERNEST L. WILKINSON,
Attorney of Record,
744 Jackson Place, N.W.,
Washington 6, D. C.

FRANCIS M. GOODWIN,
JOHN W. CRAGUN,
GLEN A. WILKINSON,
Of Counsel.

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* * * *

ANSWER

Comes now the defendant, by its Assistant Attorney General, and for its answer to the petition filed herein, alleges and states as follows:

First Defense

1. The petition fails to state a claim upon which relief can be granted.

Second Defense

2. Each and every of the claims and causes of action set out in the petition have been adjudicated by final judgments of the Court of Claims as hereafter set out.

3. In Court of Claims case No. 30360, decided May 23, 1910 (45 C. Cls. 440, 453, 471), the Ute Indians, including petitioner's predecessors in interest, were awarded the net sum of $3,408,611.40 as the proceeds of all cash sales and the value of lands reserved for public uses from the lands ceded under the Agreement of June 15, 1880, up to July 1, 1908. The parties plaintiff to that action are set out in the Court's Finding I (45 C. Cls. pp. 442-443), and that the lands there involved included the lands complained of in the petition herein appears from the Court's Findings IV-V (pp. 445-449) and from the construction of the Agreement of June 15, 1880 (21 Stat. 199), and subsidiary agreements and acts, in the opinion of the Court (pp. 456-461). The accounting in case No. 30360 was extended to June 30, 1910, by decision of the Court of Claims of February 13, 1911 (46 C. Cls. 225).

4(a). Thereafter Sections 1 and 6 of the Act of June 28, 1938 (52 Stat. 1209), as amended, authorized and virtually directed the Court of Claims to adjudicate all remaining claims on the part of the Ute Indians, or any tribe or band thereof, including compensation for any lands formerly belonging to said bands of Ute Indians, or any of them, taken by the United States without compensation or disposed of in any manner whereby the said

Indians were deprived of the use and benefits of such lands.

(b). The exhaustive investigation and prosecution of all valid claims under this act, including all possible claims arising out of the transactions alleged in the petition herein, are summarized in the decision of the Court of Claims awarding attorneys' fees in the *Confederated Bands of Ute Indians* v. *The United States*, decided November 6, 1951 (120 C. Cls. 609, Fdgs. 23-28, pp. 621-627). Judgments in decided cases, totaling over $31,000,000, are listed in finding 1 (p. 610) and the issues involved are analyzed in findings 47-69 (pp. 635-648).

5(a). Cases numbered 45585, 46640, 47564 and 47566 all terminated in simultaneous judgments on stipulations entered July 13, 1950 (117 C. Cls. 433-440) in favor of plaintiffs, including petitioner herein.

(b). The stipulation for final judgment and the final judgment entered in Court of Claims case No. 46640 (117 C. Cls. 436-438) are specifically pleaded as a bar and estoppel to the claims asserted in the petition. Case No. 46640 was filed October 15, 1945. The petition was amended March 19, 1947, and the cause was prosecuted under the Act of June 28, 1938, as amended, and under the pertinent sections of the Indian Claims Commission Act.

(c) The stipulation provided for a net judgment, after all allowable offsets, of over $6,000,000.00, for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880, which the United States had sold for cash between July 1, 1910, and June 28, 1938, disposed of as free homesteads from December 19, 1885, to June 28, 1938, and set aside for public purposes during the period June 30, 1910, to June 27, 1938. The stipulation provides:

> * * * So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata*,

> not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes. * * *

The matter of division and distribution of the judgment among the several bands, which included petitioner, was reserved.

Third Defense

6. There is a fatal defect of parties plaintiff as hereafter set out.

7. As appears from the second defense, the bands or tribes of Ute Indians which joined in the Agreement ratified by the Act of June 15, 1880, are real and necessary parties in interest to the claims asserted in the petition.

8. The "Southern Utes," referred to in the Agreement of 1880 and at all times subsequent thereto down to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), consisted of the Capote, Muache and Weeminuche Bands of Ute Indians. The "Southern Utes," as so used, are now divided into the Southern Ute Tribe, petitioner herein, and the Ute Mountain Tribe (100 C. Cls. p. 415). The Ute Mountain Tribe or Band has an interest in the subject matter of the claims asserted in the petition and is a necessary party to this proceeding.

Fourth Defense

9. The allegations of paragraph 1 of the petition are denied, except it is admitted that petitioner is now an organization or association known and recognized under the name of Southern Ute Tribe of the Southern Ute Reservation.

10. The allegations of paragraph 2 of the petition are admitted, except that it is denied that the claims set out

in the petition are maintainable under Section 2 of the Indian Claims Commission Act.

11. The allegations of paragraph 3 of the petition are admitted to the extent that they are supported by the copy of said contract on file with this Commission and by the original thereof.

12. The allegations of paragraph 4 of the petition constitute a negative pregnant and, as such, an admission that the claims, in whole or in part asserted in the petition, have been included in suits not pending, but determined in the Court of Claims or in the Supreme Court of the United States and that said claims have been filed in the Court of Claims under legislation not in effect on August 13, 1946. As appears in defendant's second defense, the admission is substantially correct, except that by amendment the authorizing act for previous cases was extended through August 13, 1946.

13. The allegations of paragraph 5 of the petition are denied.

14. Paragraph 6 of the petition states a conclusion of law, which requires neither admission nor denial.

15. The allegations of paragraph 7 of the petition are denied.

16(a). The allegations of paragraphs 8a through 8g of the petition are contrary to the findings and opinions of the Court of Claims in cases No. 30360 (45 C. Cls. pp. 445-449, 454-455, 456-461) and No. 45585, decided October 4, 1943 (100 C. Cls. 413, 415-418) and are denied, except as stated in said cases and as appear in the related public acts and documents.

(b). In response to paragraphs 8h and 8i of the petition, it is admitted that certain unallotted and undisposed of lands were returned to tribal ownership as set out in the Order of the Secretary of the Interior of September 14, 1936 (5 Kappler 659), and all other allegations are denied.

17. The allegations of paragraphs 9a through 9d of the petition are denied on the basis of the adjudications of the Court of Claims heretofore pleaded in defendant's second defense and more particularly case No. 30360 and case No. 46640.

Fifth Defense

18. Defendant says that it has from time to time, although under no obligations to do so, expended on behalf of petitioner and petitioner's predecessors in interest various sums of money out of gratuity appropriations, that accountings have been previously made therefor in the various Court of Claims actions hereinbefore alleged, but if liability is adjudged said accountings may have to be re-examined and restated and will therefore be subsequently set forth by an amendment hereto pursuant to Rule 12 of this Commission, if it should be determined that the defendant is liable to petitioner in any amount.

19. While at all times asserting that petitioner has no interest in and to the subject matter of the several claims set forth in the petition filed herein and that said claims are not actionable, defendant further alleges that, if any sum should be found to be due by this Commission, petitioner is not entitled to any interest thereon.

WHEREFORE, having fully answered the petition this defendant prays:

1. That this cause be set down for preliminary hearing on the question of liability, and
2. That the petition be dismissed and the petitioner recover nothing from the defendant.

PERRY W. MORTON,
Assistant Attorney General.

W. BRAXTON MILLER,
Attorney for Defendant.

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* * * *

PETITIONER'S EXCEPTIONS TO DEFENDANT'S ACCOUNTING

Petitioner, the Southern Ute Tribe or Band of Indians, takes exception to defendant's accounting in this proceeding in the following respects:

1. Petitioner excepts to any delay of more than 30 days in covering any of petitioner's interest-bearing moneys into the United States Treasury after they had been received by defendant's agents, and to the failure of defendant to account for interest lost to petitioner through any delay of more than 30 days in depositing moneys in interest-bearing accounts.

2. Petitioner excepts to the failure of defendant to disclose the length of time during which petitioner's moneys were withdrawn from interest-bearing accounts and held in noninterest-bearing status before the moneys so withdrawn were expended by defendant's agents or restored to interest-bearing status, and to show the amount of interest lost to petitioner while its moneys were held in noninterest-bearing status.

3. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: "Proceeds of Southern Ute Reservation" and the failure to show the amount of interest lost to petitioner through the failure to credit the fund with interest as required by law.

4. Petitioner excepts to the erroneous transfer from its fund "Proceeds of Southern Ute Reservation" of $193.25 to the "Confederated Bands of Utes 4% Fund", and to the failure of defendant to account for the interest lost to petitioner as a result of the erroneous transfer.

5. Petitioner excepts to the erroneous transfer from its fund "Interest on Proceeds of Southern Ute Reservation" of $800.00 to the fund "Interest on Ute 5% Fund, Southern Ute".

6. Petitioner excepts to the use of its tribal funds for all agency, educational and other expenses which were

obligations of defendant, and to the failure of defendant to disclose (a) the amount of petitioner's tribal funds expended for obligations of the defendant and (b) the amount of interest lost to petitioners as a result of this improper use of its funds. The purposes for which petitioner's funds were used, which appear on their face to be improper as a use of trust funds to discharge the defendant's personal obligations, are listed as follows (GAO Rept., pp. 19-27, 28-36):

Agency buildings and repairs
Agricultural aid
Agricultural implements and equipment
Automobiles, vehicles, maintenance and repairs
Clothing
Development of Oxford tract
Fuel, light, water and sewage
Exhibit hall
Hardware, glass, oils and paints
Household equipment and supplies
Livestock
Maintaining law and order
Medical expenses
Mills and shops
Miscellaneous agency expenses
Miscellaneous building material
Operation of coal mine
Pay of carpenters
Pay of clerks
Pay of farmers
Pay of teamsters
Pay of truck drivers
Pay of herders and stockmen
Pay of interpreters
Pay of laborers
Pay of mechanics
Pay of sawmill employees
Provisions
Roads and bridges
Transportation, etc., of supplies

7. Petitioner excepts to defendant's disbursements from its funds which bore interest or a higher rate of interest when money was or would have been available from other funds bearing no interest or a lesser rate of interest if defendant had discharged its fiduciary obligations in the light of the foregoing exceptions, and to the failure of defendant to account for the amount of interest lost to petitioners through disbursements from interest-bearing funds when funds bearing no interest or a lesser rate of interest were or should have been available.

Wherefore, petitioner demands that defendant account in those material respects herein set forth and that judgment be had by petitioner for any amounts found to be due and owing to it as a result of defendant's use of its funds.

Respectfully submitted,

JOHN W. CRAGUN
Attorney of Record

WILKINSON, CRAGUN & BARKER
CLARON C. SPENCER
Of Counsel

[Title Omitted in Printing]

* * * *

FIRST AMENDMENT TO PETITIONER'S EXCEPTIONS TO DEFENDANT'S ACCOUNTING

The petitioner's initial exceptions to defendant's accounting filed on June 11, 1963, are hereby amended by adding thereto the following paragraphs:

"8. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: Indian moneys, Proceeds of Labor, Southern Ute Indians, and to the failure to show the amount of interest lost to petitioner through the failure to credit interest as required by law."

"9. Petitioner excepts to the inadequacy of defendant's purported accounting on the further ground that it has not been brought up to date and, therefore, does not reflect what has been done with petitioner's money since 1951 when the initial General Accounting Office report was closed."

Paragraph 6 of the initial exceptions is amended to expand the citation in parentheses to include pages 511 to 519 in the GAO report for the Court of Claims case No. 47567.

The amendment is necessary. After the initial exceptions had been filed and during an investigation into the General Accounting Office records in the pending Court of Claims case *Confederated Bands of Ute Indians* v. *United States*, No. 47567,* counsel discovered the existence of a Southern Ute fund in the Treasury entitled Indian Moneys, Proceeds of Labor, Southern Ute Indians. Certain important information pertaining to this

* No. 47567 in the Court of Claims is a general accounting case for the Confederated Bands of Ute Indians and deals with Confederated Ute funds arising from the former Confederated Ute reservation in Colorado. No. 47567 does not involve funds belonging solely to the Southern Ute tribe. It does not involve any money or funds arising from Southern Ute ownership of the Southern Ute Reservation.

fund had been placed in the GAO report for the Court of Claims case No. 47567 instead of in the GAO report prepared for this case.

By the addition of paragraph 8 and the addition to the initial paragraph 6 in its exceptions, petitioner places in issue the defendant's handling of petitioner's Proceeds of Labor fund on the same grounds applied to the other funds of petitioner named in the initial exceptions.

Paragraph 9 is added to make it clear that petitioner insists upon a full and complete accounting from defendant.

Respectfully submitted,

JOHN W. CRAGUN
JOHN W. CRAGUN
Attorney of Record

WILKINSON, CRAGUN & BARKER
CLARON C. SPENCER
Of Counsel

[Certificate Omitted in Printing]

17 Ind. Cl. Comm. 28

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PETITIONER

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: May 6, 1966

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Petitioner, the Southern Ute Tribe of the Southern Ute Reservation, Colorado, organized and incorporated under the Indian Reorganization Act and composed of the allotted Moache and Capote Bands of Ute Indians, seeks to recover (1) just compensation for its lands taken and disposed of by the United States and (2) for the wrongful use by the United States of the proceeds of other lands of petitioner.

2. The lands involved in this proceeding lie within the boundaries of the present day Southern Ute Indian Reservation. The reservation was originally part of a larger reservation in western Colorado to which the Moache and Capote Bands, together with other Ute Indian bands, compositely known as the Confederated Bands of Ute Indians, held recognized title pursuant to a treaty negotiated on March 2, 1868.

3. Historically, the Moache and Capote Bands, together with the Weeminuche Band of Ute Indians, resided on the southern part of the 1868 reservation where a separate agency was established for them on the Rio de los Pinos in accordance with Article IV of the 1868 Treaty. Pursuant to an agreement set forth in the Act of June 15, 1880 (21 Stat. 199), the Confederated Bands of Ute Indians relinquished their Colorado lands in trust to the United States except such lands as were reserved

for the Uncompahgre Utes and for the Moache, Capote and Weeminuche Bands (referred to in the agreement as "Southern Utes"), to reside upon. Thereafter, the Uncompahgre Band and other Ute Indian groups, identified as the White River Band, left Colorado and removed to Utah, while the "Southern Utes" remained in Colorado in the southern part of the 1868 reservation.

4. The Act of July 28, 1882 (22 Stat. 178), provided as follows:

> * * * That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section three of the Act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.
>
> SEC. 2. That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and for that purpose there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of five hundred dollars.
>
> SEC. 3. That all entries, settlements, or locations heretofore made, under any law of the United States, by duly-qualified persons, upon a strip of land extending northerly and southerly, not exceeding ten miles in width, within that part of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Ute Indians, and bounded on the east by the one hundred and seventh meridian of longitude west from Greenwich, shall legally date from the time they were respectively made; and the rights of said persons shall be

in all respects the same as if the lands had been legally subject to their claims when the same were initiated: Provided, however, That if homestead entries have been made on said strip, the lands so entered shall be paid for in cash, after proof which would be satisfactory under the pre-emption laws: And provided, further, That none of said lands shall be disposed of for any consideration other than cash, nor for a less price than one dollar and twenty-five cents per acre.

5. Under authority of the Act of June 15, 1880 (21 Stat. 199), and the Act of July 28, 1882 (22 Stat. 178), and within the original reservation established in 1868, a reservation was surveyed for the "Southern Utes", Moache, Capote and Weeminuche Bands approximately 110 miles long, east and west, and 15 miles wide, identified as Royce Area No. 617, Colorado. The Moache and Capote Bands resided in the eastern part and the Weeminuche Band resided in the western part of the newly surveyed reservation.

6. By the Act of May 1, 1888 (25 Stat. 113, § 4), Congress authorized negotiations with the Moache, Capote and Weeminuche Bands as follows:

> The Secretary of the Interior is hereby authorized to appoint a commission, consisting of three persons, with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribe of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; and for this purpose the sum of then thousand dollars, or so much thereof as may

be necessary, is hereby appropriated, which shall be immediately available.

The Commissioners appointed to negotiate with the Indians were successful in obtaining an agreement whereby the Indians would exchange their reservation in Colorado for a new reservation in the Territory of Utah, but Congress declined to act upon the agreement and, instead, passed the Act of February 20, 1895 (28 Stat. 677), which provides in pertinent part as follows:

> * * * That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.
>
> SEC. 2. That within six months after the passage of this act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen hundred and eighty * * *. And the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians * * *.
>
> SEC. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the proceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two

of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico * * *.

SEC. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *.

SEC. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years, and, when paid, the money to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; also to Ignacio, head chief; to Buckskin Charlie, as chief of the Moaches, and Mariano, as chief of the Weeminuches, the sum of five hundred dollars each; also to Tapucke and Tabewatch, as chiefs of the Capotes, the sum of two hundred and fifty dollars each; that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute In-

dians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

SEC. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe.

7. Following acceptance by the Indians of the provisions of the Act of February 20, 1895, the Moache and Capote Bands, occupying the eastern part of the original reservation, accepted allotments, but the Weeminuche Band declined allotments and remained on the western part of the reservation where a new agency, the Navajo Springs agency, was established for them near Ute Mountain roughly 40 miles southwest of Mancos, Colorado. The lands occupied by the Weeminuche Band were set apart and reserved from entry by Section 3 of the Act of February 20, 1895 (28 Stat. 677). The Weeminuche Band and the lands which they occupied came to be known as the Ute Mountain Tribe and the Ute Mountain Reservation respectively. No lands or proceeds of lands within the Ute Mountain Reservation are claimed by petitioner.

8. The eastern part of the reservation occupied by the Moache and Capote Bands, excepting allotted lands, was opened to entry under the terms of the Act of February 20, 1895, by Presidential proclamation on April 13, 1899 (31 Stat. 1947). Years later, on September 14, 1938, all of the opened lands which had not been disposed of by the United States were restored by order of the Secretary of the Interior, to tribal status as part of the present day Southern Ute Reservation belonging to petitioner.

9. Following the opening of the Moache and Capote lands to entry, Congress passed the Act of May 17, 1900 (31 Stat. 179), entitled "An Act Providing for Free Homesteads in the Public Lands for Actual and Bona

Fide Settlers, and Reserving the Public Lands for that Purpose." That Act provides in pertinent part as follows:

> * * * That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this Act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry; Provided, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect: Provided, however, That all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States. * * * And provided further, That no lands shall be herein included on which the United States Government had made valuable improvements, or lands that have been sold at public auction by said Government.
>
> SEC. 2. That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

The purpose and effect of the Act of May 17, 1900, was to extend to persons who desired homesteads on opened Indian reservation lands the same opportunity enjoyed by settlers on the public domain, under the (free) homestead law of 1862 (12 Stat. 392), to obtain land without a cash payment.

10. After the Moache and Capote lands were opened to entry in 1899 and before the order of the Secretary of the Interior restoring the opened lands to tribal status in 1938, the defendant took from petitioner and disposed of a large part of petitioner's lands, as follows:

Free homesteads		230,066.93 acres
Soldier's additional homesteads		480.51 acres
	Total	230,547.44 acres

No payment has been made to petitioner for the 230,547.44 acres of land so taken and disposed of.

11. From certain sales of petitioner's lands the defendant collected and deposited in the Treasury of the United States in varying amounts, beginning July 26, 1899, and ending June 30, 1928, the total sum of $215,977.58. The proceeds of petitioner's land sales were recorded on the books of the Treasury to petitioner's credit in a fund entitled "Proceeds of Southern Ute Reservation." The United States thereby became the borrower of petitioner's money and had the use of it under Revised Statutes § 3644 which provides:

> All moneys paid into the Treasury of the United States shall be subject to the draft of the Treasurer. And for the purpose of payments on the public account the Treasurer is authorized to draw upon any of the depositaries, as he may think most conducive to the public interest and to the convenience of the public creditors. Each depositary so drawn upon shall make returns to the Treasury and Post Office Departments of all moneys received and paid by him, at such times and in such forms as shall be directed by the Secretary of the Treasury or the Postmaster General.

12. By the Act of April 1, 1880 (21 Stat. 70), Congress authorized the Secretary of the Interior:

> * * * To deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he

> is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.

The rate of interest to be paid on the proceeds of sales of Indian trust lands is 5% as prescribed by Revised Statutes § 3659:

> All funds held in trust by the United States, and the annual interest accuring thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum.

No interest was paid on the proceeds of sales of petitioner's lands until January 31, 1930, when the fund "Proceeds of Southern Ute Reservation" began to be credited with interest at 4% per annum, purportedly under the authority of the Act of February 12, 1929 (45 Stat. 1164), as amended by the Act of June 13, 1930 (46 Stat. 584), which provides as follows:

> That all funds with account balances exceeding $500 held in trust by the United States and carried in principal accounts on the books of the Treasury Department to the credit of Indian tribes, upon which interest is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum.
>
> SEC. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund "Indian Money, Proceeds of Labor," shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear sim-

ple interest at the rate of 4 per centum per annum from July 1, 1930.

SEC. 3. The amount held in any tribal fund account which, in the judgment of the Secretary of the Interior, is not required for the purpose for which the fund was created, shall be covered into the surplus fund of the Treasury; and so much thereof as is found to be necessary for such purpose may at any time thereafter be restored to the account on books of the Treasury without appropriation by Congress.

SEC. 4. The interest accruing on Indian tribal funds under this Act shall be subject to the same disposition as prescribed by existing law for the respective principal funds.

Interest credited on the fund "Proceeds of Southern Ute Reservation" was reflected in the noninterest-bearing fund "Interest on Proceeds of Southern Ute Reservation."

13. The defendant has paid interest, under the Act of April 1, 1880 (21 Stat. 70), on the money of other Indians deposited in the Treasury after their lands were opened and sold by defendant under statutory terms and conditions substantially the same as those contained in the Act of February 20, 1895 (28 Stat. 677).

14. From time to time, beginning on May 13, 1892, and ending on June 29, 1940, the defendant also received and deposited money belonging to petitioner in the Treasury to petitioner's account in the fund "Indian Moneys, Proceeds of Labor, Southern Ute Indians." The total sum deposited was $19,124.22 derived from the following sources:

Advertising fees	Sale of farm and dairy products
Coal royalties	Sale of iron
Grazing fees	Sale of livestock
Interest on official accounts	
Lease of tribal lands	Sale of rifles, separator, and typewriter

Payment for damages to telephone line	Sale of subsistence
Payments for railroad right of way	Sale of timber
Payment for threshing services	Sale of water
Rental of livestock	Trespass fees
Rental of school building	
Sale of agricultural implements	

No interest was paid on any part of the money deposited in the fund until January 9, 1931, when interest began to be credited at 4% per annum and was recorded in the fund "Interest on Proceeds of Labor, Southern Ute Indians."

16. Petitioner has challenged the defendant's use of petitioner's money for the following purposes, as listed in defendant's accounting:

Agency buildings and repairs	Miscellaneous building material
Agricultural aid	Pay of carpenters
Agricultural implements and equipment	Pay of clerks
Automobiles, vehicles, maintenance and repairs	Pay of farmers
Clothing	Pay of teamsters
Development of Oxford tract	Pay of truck drivers
Fuel, light, water and sewage	Pay of herders and stockmen
Exhibit hall	Pay of interpreters
Hardware, glass, oils and paints	Pay of laborers
Household equipment and supplies	Pay of mechanics
Livestock	Pay of sawmill employees
Maintaining law and order	Provisions
Medical expenses	Roads and bridges
Mills and shops	Transportation, etc., of supplies
Miscellaneous agency expenses	

Inasmuch as the propriety of the above expenditures by defendant remains to be determined, it will be neces-

sary to have further hearings and evidence with regard thereto.

17. When the defendant expended moneys from petitioner's interest-bearing and noninterest-bearing funds, the balances in noninterest-bearing funds were not exhausted before expenditures were made from interest-bearing funds, when both types of funds were equally available for such expenditures.

If defendant had credited petitioner's two interest-bearing funds with interest when the money came into defendant's possession beginning in 1892 and 1900, allowing a reasonable period for delay in deposit, substantial sums of noninterest-bearing funds would have been available to free interest-bearing funds from the charges which defendant made against those funds both before and after interest began to be credited on those funds.

By reason of the expenditure of interest-bearing funds before the expenditure of moneys from the noninterest-bearing funds and by reason of the failure of defendant to credit the interest-bearing funds with interest prior to 1930, the plaintiff has lost interest upon its interest-bearing funds. Since the interest so lost would have been deposited in noninterest-bearing funds it has not been available further to reduce expenditures from the interest-bearing funds.

18. Defendant has acknowledged an erroneous credit of $7.74 to the Confederated Bands of Ute Indians and erroneous transfers of $193.25 from the "Proceeds of Southern Ute Reservation" fund and $800 from the "Interest on Proceeds of Southern Ute Reservation" fund.

19. Petitioner is entitled to recover just compensation for 230,547.44 acres of land taken by defendant and disposed of as free homesteads or soldiers' additional homesteads, based upon the value of such lands as of the date of taking together with interest sufficient to contribute the present full equivalent of that value paid contemporaneously with the taking. The value of the land and the date of taking will be determined at a subsequent proceeding.

20. Petitioner is entitled to recover the total amount by which its funds would have been increased (1) through

the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest.

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

[Title Omitted in Printing]

* * * *

Opinion of the Commission

Scott, Associate Commissioner, rendered the opinion of the Commission.

Petitioner herein, the Southern Ute Tribe, a duly organized tribe of Indians with the right to maintain this action has, by petition duly filed, prayed the Commission for judgment against defendant under Clauses 1, 3 and 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049) "* * * for an amount which will provide fair and just compensation for the approximately 220,495.17 acres of land unlawfully disposed of by defendant, and that defendant be required to render a true, complete and proper accounting for the proceeds received by it from the disposal of the approximately 81,953.18 acres of land, less any proper credits or set-offs, * * *".

The specific allegations of the petition upon which petitioner relies as a basis for the above prayer are 8e and 8f and the corresponding allegations of damages found in 9a through 9d.

Paragraphs 8e and 9a and 9b concern themselves with the disposal of Free Homesteads, Soldiers' Additional Homesteads, Other Reservations of Land, and Homestead Applications. After a search of the records of the Bureau of Land Management petitioner has increased the acreage alleged to 230,547.44 acres and has dropped the Homestead Application class and the Other Reservations of Land class.

Paragraphs 8f and 9c and 9d concern themselves with certain other types of land disposals and request an accounting for the proceeds therefrom alleged to have been received by defendant.

Defendant relies upon the defenses of *res judicata*, defect of parties, and lack of jurisdiction by the Commission based upon the alleged failure of petitioner to state a cause of action for an accounting for certain funds prior to the expiration of the date for filing claims before this Commission, i.e., August 13, 1951.

Underlying the defense of *res judicata* is the contention of defendant that all of the Colorado Reservation belonging to the Confederated Bands of the Ute Indians was ceded under the Treaty of June 15, 1880. This defense is directed to the proposition of whether or not defendant is liable to petitioner for the disposal of land under the Free Homestead Law instead of by sale to settlers. In order to properly assess this question it is necessary to go into the background of the relationship between the Ute Indians and defendant.

Under the Treaty of March 2, 1868 (15 Stat. 619) the defendant granted a reservation in Colorado to the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Ute Indians.

These bands subsequently became known as the Uncompahgre Utes (Tabequache), the Southern Utes (Moache, Capote, and Weeminuche), the White River Utes (Yampa, Grand River, and Uintah) and the three groups were known as the Confederated Bands of Utes, although there was no formal confederation.

The part of this reservation occupied by the Southern Utes lay along the southern border of the 1868 reservation and is today still designated as the Southern Ute Reservation.

Under the Act of June 15, 1880 (21 Stat. 199) the Confederated Bands of Utes relinquished their lands in trust to the defendant except for certain lands reserved for the Uncompahgre Utes and for the Moache, Capote and Weeminuche Bands, referred to in said Act as the Southern Utes.

The Act of July 28, 1882 (22 Stat. 178) provided for the opening of the lands lately occupied by the Uncompahgre and White River Utes and for the surveying of the line between the land so opened and that occupied by the Southern Utes.

This line established a boundary between the Southern Utes and the lands opened for sale. This created a strip of territory 110 miles long by 15 miles wide. The strip had already been created in fact as a result of the Brunot Cession of 1874 which took a portion of the Ute reservation prior to the Cession of June 15, 1880 (21 Stat. 199).

(See Docket No. 327, 11 Ind. Cl. Comm. 180) This 110 mile long area is referred to as Royce Area 617, Colorado. The Moache and Capote Bands resided in the eastern part and the Weeminuche Band resided in the western part of the area.

By the Act of May 1, 1888, Congress authorized the Secretary of the Interior to appoint a Commission, "* * * with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians * * *".

Although agreement was reached between the Commission and the Southern Utes, Congress declined to ratify it and, instead, passed the Act of February 20, 1895 (28 Stat. 677) which provided that the Treaty of June 15, 1880 be carried out. Section 2 of the Act of 1895 stated that allotments would be made to the Southern Utes "* * * out of the agricultural lands embraced in their present reservation in Colorado * * *", as provided in the Act of June 15, 1880.

Section 3 of the 1895 Act made provision for those Southern Utes who did not take allotments to occupy that part of "* * * their present reservation * * *" which lay west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian and added all of Townships 31 and 32 of Ranges 14, 15 and 16 west of the New Mexico principal meridian and lying in the Territory of New Mexico.

Section 4 provided for the opening of the remainder of the lands by Presidential Proclamation after six months from the passage of the Act, said lands to become thereafter a part of the public domain "* * * and shall be subject to entry under the desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *".

Section 5 provided for compensation to the Southern Utes and "* * * that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. * * *".

Section 6 stated that the provisions of the Act should take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians then located or residing upon the reservation.

The consent of the Southern Utes was duly obtained and the Moache and Capote Bands accepted allotments in the eastern part of the area and the Weeminuche, declining allotments, remained on the western part, including the area of New Mexico which was added by the 1895 Act. This group is now known as the Ute Mountain Tribe of the Ute Mountains Reservation.

On April 13, 1899 (31 Stat. 1947) the remaining unallotted lands in the eastern part of the area were opened to public entry. That portion of these lands which had not been disposed of was returned to tribal ownership on September 14, 1938.

From the above summary of the background of the relations between petitioner and defendant since the 1880 Agreement, it seems apparent that defendant has by its actions acknowledged the contention of petitioner that the area known as the Southern Ute Reservation was not ceded by the 1880 Agreement. Defendant's contention that the language of the 1880 Agreement is plain and that it ceded all of the Colorado land belonging to the entire Ute Indian group, except that to be allotted, cannot stand in the face of the treatment by defendant of that portion of the lands occupied by the Southern Utes. Every action by defendant concerning the Southern Ute Reservation has been based upon the proposition that the Southern Utes were still the rightful owners of the area. The two ultimate acts along that line were the 1895 Act which placed the proceeds of actual sales in a Southern Ute trust fund and the restoration of the undisposed of lands to Southern Ute tribal ownership in 1938.

The further argument is made that the Act of July 28, 1882 (22 Stat. 178) and the Act of February 20, 1895 (28 Stat. 677) were supplementary to the 1880 Agreement (21 Stat. 199) and were merely an attempt to force compliance by the Southern Ute with the terms of the 1880 Agreement wherein they had agreed to accept allotments.

This argument would be more persuasive were it not for defendant's subsequent action. Defendant has not followed a course of conduct with regard to the Southern Ute Reservation which tends to verify such a construction. On the contrary, as briefly outlined above, the actions of defendant have been overwhelmingly opposed to its present position.

The most telling argument against defendant's position in this regard is the treatment accorded the same argument when it was used by defendant in the case of *Confederated Bands of Ute Indians* v. *The United States*, 100 C. Cls. 413, 429-433. There the Court held that defendant acquired under the Agreement of 1880 only the right to sell the lands for the Utes and not the lands themselves. Consequently it was held that the taking in that instance occurred under the Adams amendment in 1938 unless the land had been disposed of earlier to individuals. This same argument, it seems to the Commission, would apply with equal validity to the Southern Utes.

For the foregoing reasons the Commission concludes that the Southern Utes retained the same interest in their lands and that the lands encompassed within the boundaries of the 110 mile long by 15 mile wide area were acknowledged by defendant as never having been disposed of by the Southern Utes under the 1880 Agreement. In this instance the term Southern Utes is used to include all three bands because up until the separation of the Weeminuche Band under the Act of February 20, 1895 (28 Stat. 677) they too had an interest in the whole. There is, however, no claim made herein by the present-day Southern Utes for any of the reservation set apart for the present-day Ute Mountain Utes under the 1895 Act.

Defendant's reliance upon Court of Claims case No. 30360, *The Ute Indians* v. *The United States*, 45 C. Cls. 440, is misplaced in view of the Commission's decision that the June 15, 1880 Agreement (21 Stat. 199) did not effect the disposition of the Southern Ute Reservation. The accounting had in that case which included any of the Southern Ute lands disposed of under the February 20, 1895 Act (28 Stat. 677) was clearly beyond the jurisdiction of the Court of Claims under the terms of the Jurisdictional Act of March 3, 1909 (35 Stat. 788-789) which conferred jurisdiction upon the Court to carry out the terms of the June 15, 1880 Agreement.

The error which caused the proceeds already placed to the credit of the Southern Ute Tribe to be included in that judgment was just that, an error on the part of all concerned. Under the terms of the 1895 Act those funds had been handled separately from the funds of the other Ute tribes. The lands had been opened at different times by different acts from those involving the Confederated Ute lands and the money had been placed in a trust fund to the credit of the Southern Utes, whereas the money received from land sales under the 1880 Agreement was placed to the public treasury instead of to the credit of the Confederated Utes.

Defendant also relies upon other litigation between the Confederated Ute Bands and itself. Specifically, defendant pleads the cases found in 100 C. Cls. 413, 112 C. Cls. 123, and 117 C. Cls. 443, being the series of cases between the Confederated Bands of Ute Indians and defendant which arose under the Jurisdictional Act of June 28, 1938 (52 Stat. 1209) as amended. This litigation did not include any of the lands of the Southern Ute Tribe which are in controversy in this case.

The stipulation entered into between the Confederated Utes and defendant as a part of the judgment in those cases was limited to lands ceded under the Act of June 15, 1880 (21 Stat. 199) and under the Jurisdictional Act, as amended, of June 28, 1938.

While petitioner herein, the Southern Utes, was a constituent part of the petitioner therein, Confederated Utes,

it is not precluded from bringing this different cause of action under its own name and in its own right. By the same terms, any language in the stipulation settling the cases under the 1938 Jurisdictional Act will not bar defendant from asserting offsets, if any, which it may have against the petitioner herein. This is a separate and distinct cause of action from any of those asserted in the prior cases and neither petitioner nor defendant is bound by the proceedings therein with regard to the matters being litigated in this case.

As stated in *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933):

* * * *

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *Sac County*, 94 U.S. 351, 352, 353; *Southern Pacific R. Co.*, v. *United States*, 168 U.S. 1, 48; *United States* v. *Moser*, 266 U.S. 236, 241.

* * * *

As we have stated above, this is a separate and distinct cause of action by a different petitioner for lands disposed of pursuant to the Act of February 20, 1895 (28 Stat. 677) as free homesteads. This, of course, places the present case squarely within the law as set forth above in the *Tait* case in that, even assuming the parties were the same, the claim herein is upon a different claim or demand.

For the above reasons we are of the opinin that petitioner, the Southern Ute Tribe as it presently exists, is entitled to recover of defendant upon its claim for the value of 230,547.44 acres of land disposed of by defendant from their reservation without compensation therefor as called for by the Act of February 20, 1895 (28 Stat. 677).

The question as to whether the taking was one under the Fifth Amendment to the Constitution seems to be well settled under several decisions of the Supreme Court and the Court of Claims, which decisions have been followed by this Commission.

The title under which the Southern Utes held their reservation was recognized by the Treaty of March 2, 1868 as being in the Confederated Utes of which they were then a part. Thereafter defendant by several different actions mentioned earlier in this opinion reaffirmed the title of the Southern Utes to their reservation after the Act of June 15, 1880 separated them by placing the remainder of the original reservation under the control of defendant.

The taking of petitioner's recognized title by defendant constituted a taking under the Fifth Amendment to the Constitution for which petitioner is entitled to recover just compensation based upon the value of the lands as of the date or dates of taking, together with interest thereon sufficient to produce the present full equivalent of the value of those lands as of the date or dates of taking. *Creek Nation* v. *United States*, 295 U.S. 103 (1935).

The taking of these lands by defendant covered a period of many years because they were disposed of as free homesteads and soldiers' additional homesteads, so each taking occurred when the ownership of each individual became final. *Creek Nation* v. *United States*, 302 U.S. 620, 622 (1938).

As suggested in the *Creek* case cited above, the dates would normally be the date of the patent to the individuals. Since this would be a burdensome job it is suggested that an average date or dates be worked out by the parties subject to the approval of the Commission.

It would appear that defendant's asserted defense of lack of necessary parties is a constituent part of its claim that the entire Colorado Reservation of the Confederated Utes was ceded in 1880. Had that been the case then the present-day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties. Since it has been determined that peti-

tioner's lands were not ceded by the 1880 Agreement this defense is of no validity.

Also, any claim which the Ute Mountain Utes might have, if any, would be separate from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation.

The next phase of petitioner's case concerns the handling by defendant of its trust fund moneys arising from the sale of the Southern Ute Reservation lands under the terms of the Act of February 20, 1895.

Defendant contends that this accounting claim is not within the jurisdiction of this Commission because of the failure of petitioner to allege such a cause of acton prior to the expiration of the five year period of limitations provided by Section 12 of the Indian Claims Commission Act, 25 U.S.C., Sec. 70k. This period expired on August 13, 1951 and defendant contends that this accounting claim was first alleged in 1963 by means of exceptions by petitioner to defendant's accounting report filed in response to the petition.

Petitioner included among its allegations contained in the petition filed on August 10, 1951, a claim for an accounting for moneys received by defendant for some 81,-953.18 acres of land disposed of in various ways other than as free homesteads or soldiers' additional homesteads. As stated previously this allegation is found in paragraph 8f and the allegations of damages are found in paragraphs 9c and 9d of the petition.

Defendant presented to petitioner an accounting report by the General Accounting Office in reply to the allegation contained in the petition. This report set forth, among other things, an accounting of the proceeds derived from the sale of certain lands pursuant to the Act of February 20, 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951.

Petitioner, after receiving this report, proceeded to file exceptions to certain matters contained therein. These exceptions were filed June 12, 1963.

On September 30, 1963 petitioner filed an amendment to its exceptions, adding thereby two more exceptions, the

last of which calls for an extension of the accounting by defendant "up to date".

Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its petition for certain specific items and has now raised by means of the exceptions mentioned above, and after the receipt of defendant's General Accounting Office Report, certain general accounting claims not referred to in its petition.

Defendant's contention, carried to its ultimate conclusion, would seem to place upon petitioner the burden of knowing what defendant had done with its money before filing its petition. This would be unreasonable on its face. Petitioner cannot be expected to know what its trustee has done with money under its control until such time as petitioner is presented with the figures.

The essential question is whether petitioner is to be penalized for not calling for a general accounting instead of an accounting for specific items which it had reason, based upon the terms of the Act of February 20, 1895, to suspect might have been mishandled by defendant.

This is a matter peculiar to our organic act with its definite period of limitations. It is not readily apparent how a similar question could arise under general law since limitations would not, as a normal rule, begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.

We think that much the same principle should apply to a similar situation under our enabling legislation and that the issues raised by petitioner as a result of defendant's accounting are reasonable in that petitioner was not in a position to know whether defendant was properly executing its duties as trustee. Defendant, being in the unique position of not having to file periodic accountings to its Indian wards, should not be allowed to take advantage of that fact for its own protection.

We are of the opinion that the allegation for a specific accounting which brought forth the accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a sufficient basis for requiring a further and complete accounting from defendant with

regard to those items questioned by petitioner in its exceptions.

The Commission is aware that defendant restricted the introduction of the General Accounting Office Report to the issue of liability for the land allegedly disposed of free and the specific accounting for lands as stated in the petition. However, defendant cannot restrict the purposes for which its evidence is introduced and thereby deny petitioner the right to an accounting for which a basis has been established in the petition.

The exceptions to defendant's accounting filed by petitioner are a part of the pleadings in the case and will not be set forth in the findings or opinion. However, it is necessary to discuss them for the purpose of clarity and understanding of the Commission's ruling with regard to each of them. They will be referred to by number as they appear in the pleadings.

It should be noted at this point that defendant rested its defense entirely upon other grounds and has not yet answered or contested these exceptions.

This places the Commission in the position of ruling upon matters contained in the exceptions without benefit of a defense thereto. However, under the decision of the Commission defendant is called upon to file a further accounting and is entitled to know as nearly as possible the extent to which it will be required to expend the present accounting report. The Commission will entertain such further proceedings as may in its opinion be necessary to insure a complete record in this matter.

It should be pointed out at this juncture that the Commission in this opinion is restricting its rulings to the questions arising under existing agreements between petitioner and defendant, i.e., the Act of February 20, 1895 (28 Stat. 677), wherein by Section 5 it was agreed that certain moneys of the Southern Ute Tribe would be held in trust and to such Acts, i.e., Act of April 1, 1880 (21 Stat. 70), providing for interest on sums received from the sale of Indian trust lands; Section 3659 of the Revised Statutes (31 U.S.C. § 547a) which establishes the rate of interest on such sums at not less than 5% per annum; and Act of February 12, 1929 (45 Stat. 1164)

as amended by Act of June 13, 1930 (46 Stat. 584), providing that funds in excess of $500 held in trust by defendant in principal accounts upon which interest was not otherwise payable, should bear simple interest at the rate of 4% per annum.

The Commission does not intend to express any opinion concerning the duties or obligations of the Congress under its plenary power over Indian affairs.

Exception No. 1 concerns petitioner's right to have its moneys covered into the Treasury of the United States without undue delay. The Court of Claims in the case of *The Menominee Tribe of Indians* v. *United States*, 107 C. Cls. 23, 32-33 (1946) stated that 30 days was a reasonable time in which to deposit moneys belonging to the Menominee Tribe. The ruling thereon was based upon an implied agreement by defendant under the Acts involved to make a prompt deposit of the money. The Commission is of the opinion that the duty owed by defendant in its fiduciary capacity (See *Seminole Nation* v. *United States*, 314 U.S. 286 (1942) and *Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 10, 19) is sufficient cause to insure that administrative delays shall not deprive an Indian tribe of interest upon those funds on which it may be entitled to draw interest. Defendant shall supply the pertinent information insofar as the records will permit.

Exception No. 2 questions the practice of defendant with regard to the advancement of tribal trust funds to disbursing agents. Petitioner alleges on information and belief that there exists in many cases an inordinate delay between the time money is credited to the account of the disbursing agent, thereby stopping the payment of interest, and the time of its actual disbursement. During this period of time defendant has the use of this money without the payment of interest, petitioner alleges. This information is not reflected in the General Accounting Office Report and so it is impossible to tell whether the allegation is correct. Petitioner, as *cestui que trust* "* * * is entitled to demand of the trustee all information about the trust for which he has any reasonable use". (Bogert, Trusts & Trustees, § 961). Defendant, as trustee, is un-

der a duty to furnish such information, insofar as possible.

Exception No. 3 deals with defendant's alleged failure to credit interest at the rate of 5% on petitioner's tribal fund "Proceeds of Southern Ute Reservation" and the failure of defendant to show in its accounting the loss occasioned thereby.

Since the statutes appear to be quite clear with regard to the duty of defendant to deposit such funds (21 Stat. 70) and make them productive (31 U.S.C. § 547a) in its capacity as trustee, then it is bound to credit such interest and to show its calculations in doing so in order that petitioner may check the results of such calculations. See *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802 (1946); *Wootton Land & Fuel Co.*, v. *Ownbey*, 265 Fed. 91, 99-100 (C.C.A. 8, 1920).

Exception No. 4 concerns the erroneous transfer of $193.25 from petitioner's fund "Proceeds of Southern Ute Reservation" to the "Confederated Bands of Utes 4% Fund" and the interest lost by such transfer.

This exception seems clear on its face and defendant must account for the transfer and the interest lost thereby. The money involved belonged to the Southern Utes and not to the Confederated Bands.

Exception No. 5 deals with a similar erroneous transfer of $800 from petitioner's fund "Interest on Proceeds of Southern Ute Reservation" to the fund "Interest on Ute 5% Fund, Southern Ute."

Page 17 of the G.A.O. Report shows this to have been an erroneous transfer and petitioner is entitled to an accounting and correction.

Although not mentioned in the exceptions there is shown on Page 7 of the G.A.O. Report an erroneous credit of $7.74 to the Confederated Bands. This would seem *de minimus* but petitioner is, nevertheless, entitled to an accounting and correction.

Exception No. 6 deals with a variety of expenditures from petitioner's funds which petitioner alleges are improper as being obligations of defendant. Petitioner then specifically excepts to the failure of defendant to disclose (a) the amount of petitioner's tribal funds expended for

obligations of the defendant, and (b) the amount of interest lost to petitioner as a result of this alleged improper use of petitioner's funds by defendant.

This appears to be a situation wherein petitioner would deprive defendant of its right to defend its actions as trustee whether right or wrong. To force defendant to judge its actions and convict itself is improper. The G.A.O. Report sets forth the various expenditures and it then becomes a question of their legality under the agreements and statutes which may be applicable. Their legality is a question which ultimately must be determined by the Commission. Until that determination is made there can be no calculation of damages, if any, through loss of interest.

This is the same type of problem which this Commission had in mind when it stated in its opinion in *Sioux Tribe, et al* v. *United States*, 12 Ind. Cl. Comm. 541, 549, that it would not force defendant to point out its own wrongs under the guise of having to carry the burden of proof. The filing of an exception to the G.A.O. Report whereby the same procedure is attempted will not be permitted.

Since the specific expenditures set forth within Exception No. 6 carry with them in the G.A.O. Report the amount expended through June 30, 1951, the Commission presumes that the broad language of Subsection 6(a) of Exception No. 6 must be intended to refer to other as yet undisclosed expenditures and in that light is of the opinion set forth immediately above.

As to those specific items mentioned in Exception No. 6, it shall be incumbent upon defendant to satisfy this Commission as to their legality. (*The Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802) Until that decision is reached there can be no accounting by defendant with regard to these specific items insofar as loss of interest, if any, is concerned.

Exception No. 7 goes into the broad problem of defendant's expenditures from various funds belonging to petitioner. It is petitioner's contention that defendant's fiduciary obligation required it to expend petitioner's money in a manner so as to conserve it to the best advantage

of petitioner. Specifically petitioner contends that wherever defendant chose to disburse money from a fund or funds bearing a higher interest rate than another fund or funds which were or should have been equally available and which carried no interest or a lower rate of interest, it was guilty of enriching itself at the expense of its *cestui que trust.*

On the evidence before us it appears that the situation with regard to the expenditures from various funds does not differ in this case from that of the *Menominee Tribe* v. *United States*, 101 C. Cls. 10, 21 (1944), wherein the Court stated:

* * * *

> We conclude, therefore, that to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non-interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them.

* * * *

Defendant will furnish the appropriate information in its supplemental accounting.

Exception No. 8, filed by way of amendment after discovery by petitioner of the information contained in the G.A.O. Report for Case No. 47567 before the Court of Claims, consists of an objection to the failure of defendant to credit interest at the rate of 5% on its fund "Indian Moneys, Proceeds of Labor, Southern Ute Indians" and to the failure of the G.A.O. Report to show the amount of interest lost thereby.

Petitioner ends this exception with the statement "* * * as required by law". There is in evidence no statute or statutes requiring the payment of interest at 5% on miscellaneous funds. The only statute to which our attention has been called is that of February 12, 1929 (45 Stat.

1164), as amended by the Act of June 13, 1930 (46 Stat. 584) which requires that tribal funds included in the fund "Indian Money, Proceeds of Labor" should bear simple interest after July 1, 1930 at the rate of 4%.

Insofar as the accounting shown in Petitioner's Exhibit No. 25 (accounting in Case No. 47567) is deficient under those statutes, defendant shall prepare a proper accounting.

It is the opinion of the Commission that on the record before us petitioner is entitled to 4% interest from the date of the applicable statute of June 13, 1930 (46 Stat. 584) and not to the 5% claimed. It is also entitled to have the accounting brought up to date, including the interest due, if any.

Petitioner contends that the moneys received by defendant from sales of timber, water and iron, from grazing fees and from land leases, are proceeds of the land and constitute an element of value in those lands and so should have interest credited at 5% the same as the land proceeds. Petitioner cites *United States* v. *Klamath Indians*, 304 U.S. 119, 122 (1938) as support for this contention.

We do not agree that this case is in point. In that case the Indians would have been denied the value of the timber had it not been included in the value of the land. This is not the case here. The value of these elements has been received by petitioner and we are now talking of the amount of interest to be paid by defendant under the appropriate statutes on those funds after they come under defendant's control as trustee.

It is our opinion that once those elements were converted to money in the Treasury they assumed the character of general funds and as such fell under the statute calling for 4% interest rather than the statute requiring 5% interest on moneys from trust lands.

Petitioner also amends Exception No. 6 to include the specific expenditures listed in the portion of the G.A.O. Report in Case No. 47567 known as Petitioner's Exhibit No. 25 in this case. The same ruling applied in Exception No. 6 would apply to these expenditures. Defendant, as trustee, must satisfy this Commission as to their

legality under the *Sioux* case cited in Exception No. 6, and no further accounting can be had until this is done.

Exception No. 9 raises the question as to the adequacy of defendant's G.A.O. Report since it does not account beyond June 30, 1951.

This is a question of first impression with this Commission. The closest analogy to this situation within the Commission's decisions is the matter of offsets. In the case of *The Kiowa, Comanche and Apache Tribes* v. *United States*, 5 Ind. Cl. Comm. 72, 109-111, the right of defendant to present claims for gratuitous offsets beyond the cutoff date for filing cases before the Commission was upheld.

This ruling was made on the authority of the Court of Claims decision in the *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 811-812, wherein the Court did allow offsets by defendant after the closing date of the jurisdictional act permitting the suit.

The *Sioux* case was an accounting case just as this part of the present case is. The Court stated as follows:

* * * *

> Plaintiff does not ask that final judgments be now entered for the amounts of the balances shown, but contends that since it was the duty of defendant under the allegations of the original petition to make a complete accounting with reference to these and other trust funds, and such accounting has not been rendered subsequent to June 30, 1925, judgments should be entered that plaintiff is entitled to recover with respect to the balances and that further proceedings should be had under Rule 39(a) to determine, on further accounting, the exact amounts, if any, for which final judgments should be entered. In other words plaintiff says that after we have decided the issues presented we should order a further accounting as to the balances and allow plaintiff another opportunity to raise further issues if it should so desire.
>
> There must be an end to the cases. We cannot keep them open indefinitely for plaintiff's convenience in order that it may have several trials and decisions

> in each case as to its legal right to recover on the issues presented and which may be later presented before closing the cases on final accounting as to the offsets, if any, against such amounts as may be due under the decision on the issues presented when the cases were prepared, argued and submitted. Rule 39(a) was not intended to authorize or provide for several trials on questions as to legal rights of an Indian Tribe to recover, or to permit piecemeal trials in chief. Plaintiff knew when it received the accounting report on April 19, 1932, that the accounting ended on June 30, 1925, and no mention was made of the matter until the briefs in the seven cases were filed. The cases were argued and submitted on the specific issues decided herein, and if plaintiff believes that it has other or further claims it must petition Congress for relief or for further permission to sue thereon. Plaintiff has had its day in court as to the right of recovery on all issues which it saw fit to raise, prepare and submit for decision. The time has passed for asking for a remand for a further or supplemental accounting on matters concerning questions required to be tried and submitted in the first trial under Rule 39(a). Cf. *Cherokee Nation* v. *United States*, 102 C. Cls. 720, 760.
>
> * * * *

It will be noted from the above quoted language that the basis for the Court's refusal to permit a further accounting from defendant was based upon the failure of petitioner to raise the question in a timely manner. The case had been completed upon the issues presented after petitioner had the G.A.O. Report and knew its closing date. It is obvious that the Court could foresee an endless round of trials with defendant updating offsets and petitioner updating accounting claims. Primarily, however, the Court appeared to feel that petitioner had failed to take advantage of its opportunity to raise the matter before the deadline for filing under the jurisdictional act.

We have held herein that petitioner is not barred from raising the accounting issues under Section 12 of our organic act and so any claim for an up-to-date accounting is still a "live" claim as well.

We too accept the necessity for an end to those cases and under the same circumstances as in the *Sioux* case would feel bound to follow the decision of the Court of Claims therein.

Since this is a matter wherein defendant will be under the necessity of accounting further for its handling of petitioner's money and the issues are not yet closed by decision of the Commission it is our opinion that defendant should bring its accounting up to the date of the judgment herein. This would be equivalent to the right of defendant to assert offsets to the same date. Since our act is silent as to both questions it appears equitable that both parties be treated the same with respect to the offsets of defendant and the accounting due petitioner.

This matter will now proceed to a determination of the date or dates of taking of the 230,547.44 acres of petitioner's lands by defendant and the value of said lands on such date or dates.

Since no consideration was paid for these lands, that phase of the litigation is not involved and defendant may proceed to amend its answer and set forth its offsets, if any, in conformity with the rules of the Commission.

The accounting phase of this case may not proceed until a decision is reached with regard to the specific expenditures alleged by petitioner to have been improperly made by defendant. The parties shall proceed immediately to present to this Commission their evidence and arguments concerning the expenditures listed in Finding of Fact No. 16 and those set forth in Court of Claims Case No. 47567 and which are listed in Petitioner's Exhibit No. 25 in this case wherein they properly belong.

Upon the decision as to these expenditures defendant will be required to file its supplemental accounting.

An order to the above effect will be entered.

T. HAROLD SCOTT
Associate Commissioner

We concur:

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

[Title Omitted in Printing]

* * * *

FIRST INTERLOCUTORY ORDER

UPON the findings of fact this day entered in this cause and which are made a part of this order, the Commission concludes as a matter of law that petitioner is entitled to just compensation for 230,547.44 acres of petitioner's land disposed of by defendant without payment to said petitioner, and it is

FURTHER CONCLUDED as a matter of law that petitioner is entitled to a supplemental accounting from defendant with regard to the matters set forth in the findings of fact and in accordance with the opinion of the Commission this day filed, and it is therefore

ORDERED that this cause shall proceed to a determination of the date or dates of taking of petitioner's lands and the value of said lands upon such date or dates, and

THAT the parties herein shall forthwith present to this Commission their contentions with regard to the specific items of expenditure by defendant from petitioner's fund or funds which have been challenged by petitioner as being improper, including those items set forth in Finding of Fact No. 16 and those items in Petitioner's Exhibit No. 25, which were challenged by way of exception.

Dated at Washington, D. C., this 6th day of May, 1966.

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

T. HAROLD SCOTT
Associate Commissioner

IN THE UNITED STATES COURT OF CLAIMS

App. 7-66

THE UNITED STATES, APPELLANT

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, APPELLEE

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELETON and NICHOLS, Judges

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ORDER

This case comes before the court on the appeal by the United States from the interlocutory order of the Indian Claims Commission entered May 6, 1966, in its Docket No. 328. Upon consideration thereof, together with the opposition of the appellee, the court is of the opinion that, in the light of the appellee's acknowledgment at the oral argument that the lands involved in this case were ceded to the United States by the Act of June 15, 1880, but were in effect re-ceded to the appellees by the Act of February 20, 1895, the case should be remanded to the Commission for the hearing of additional evidence and the making of findings of fact with respect to the intention of the parties to the stipulation upon which a final judgment was entered in Court of Claims Case No. 46640 (117 Ct. Cl. 436) on July 13, 1950.

NOW, THEREFORE, IT IS ORDERED that this case be and is hereby remanded to the Indian Claims Commission with instructions to hear additional evidence, including but not limited to testimony of the signatories to the stipulation mentioned above, and to make and report to this court findings of fact on the question as to whether by said stipulation, it was the intention of the parties thereto that the final judgment entered in Court

of Claims Case No. 46640 would be *res judicata* as to the land involved in this case. *Cf. Standing Rock Sioux Tribe of North Dakota and South Dakota* v. *United States*, No. 259-63, order of November 14, 1966.

BY THE COURT

WILSON COWEN
Chief Judge

May 15, 1967

COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

App. 7-66

THE UNITED STATES, APPELLANT

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS, APPELLEE

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELETON and NICHOLS, Judges

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ORDER

This case comes before the court on appellant's motion for rehearing and appellee's motion to vacate order of remand. Upon consideration thereof, together with the response thereto and without oral argument,

IT IS ORDERED that the said motions be and the same are denied.

IT IS FURTHER ORDERED that the following words and punctuation, appearing in the first paragraph, starting at line 6 thereof, of the order entered herein on May 15, 1967, be and the same are deleted and vacated: ", in the light of the appellee's acknowledgment at the oral argument that the lands involved in this case were ceded to the United States by the Act of June 15, 1880, but were in effect re-ceded to the appellees by the Act of February 20, 1895,".

BY THE COURT

WILSON COWEN
Chief Judge

Filed Oct. 9, 1967
Court of Claims

21 Ind. Cl. Comm. 268

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: June 27, 1969

ADDITIONAL FINDINGS OF FACT

Statement

Plaintiff filed a petition with the Commission on August 10, 1951, praying among other things for fair and just compensation for approximately 220,495.17 acres of land unlawfully disposed of by defendant. On May 6, 1966, the Commission in the case of *Southern Ute or Band of Indians* v. *United States*, 17 Ind. Cl. Comm. 28, entered findings of fact and issued an interlocutory order concluding as a matter of law that plaintiff was entitled to just compensation for 230,547.44 acres of plaintiff's land disposed of by the defendant without payment to plaintiff. The defendant appealed from said order contending, among other things, that all claims concerning the 230,547.44 acres of land had been fully settled, paid, extinguished and adjudicated in a previous case before the Court of Claims (Case No. 46640, *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433, 436 (1950)).

On May 15, 1967, the Court of Claims issued an order of remand with instructions to the Commission to hear additional evidence, including but not limited to testmony of the signatories to the stipulation in the *Confederated Ute* case, *supra*, and to make and report to that Court findings of fact on the question as to whether by said stipulation it was the intention of the parties thereto that

the final judgment in Case No. 46640 would be *res judicata* as to lands involved in this case.

Pursuant to that remand the Commission held two hearings. The first hearing was on plaintiff's motion for the production of documents. The second hearing involved the taking of evidence as to the intention of the parties at the time of the signing of the stipulation in Court of Claims Case No. 46640.

At both hearings the defendant took the position that the stipulation spoke for itself and that the intentions of the parties would have to be determined within the four corners of the stipulation. At the hearing on plaintiff's motion for production of documents the defendant contended that all memoranda, letters, notes, instructions, and other data that were relevant to the stipulation and the compromise settlement were the "work product" of the attorneys for the Department of Justice and thus privileged material protected by Order No. 381-67 of the Attorney General, effective July 4, 1967.

Pursuant to an order of the Commission, the defendant furnished the Commission with the correspondence between the Department of Justice and the Bureau of Land Management in Denver, Colorado, relative to the preparation of Schedule 1 of the stipulation. The letters were relevant only to the extent that they corroborated the testimony of Dr. Wilkinson (attorney for plaintiff and signatory to the stipulation) as to why the word "diligence" was used in the stipulation. The letters did not relate to any matters which might reveal the intention of the defendant at the time of signing of the stipulation.

There is only one attorney now living who participated on behalf of the defendant in the settlement negotiations and execution of the stipulation. His affidavit related that without the memoranda which he prepared (but of which he does not have copies) or any other settlement papers he does not have any independent recollection concerning the defendant's intention. The government, relying on the Attorney General's Order relating to the production or disclosure of department materials and information, has withheld all memoranda, notes, or letters which might relate to the defendant's intention or which might have

refreshed the recollection of the government's then attorney. Accordingly, the Commission has no evidence introduced by defendant upon which to base any finding of fact as to the defendant's intention.

The following additional findings of fact are based solely on the evidence taken by the Commission pursuant to the order of remand:

21. On May 15, 1967, the Court of Claims remanded this case to the Commission with the following order:

> "NOW, THEREFORE, IT IS ORDERED that this case be and is hereby remanded to the Indian Claims Commission with instructions to hear additional evidence, including but not limited to testimony of the signatories to the stipulation mentioned above, and to make and report to this court findings of fact on the question as to whether by said stipulation, it was the intention of the parties thereto that the final judgment entered in Court of Claims Case No. 46640 would be *res judicata* as to the land involved in this case."

22. On April 23, 1968, a hearing was held before the Commission pursuant to this order of remand.

Plaintiff presented testimony of Dr. Ernest L. Wilkinson, partner of the law firm of Wilkinson, Cragun and Barker and a signatory to the stipulation in Case No. 46640. Plaintiff also presented the testimony of Georgette Betor Lee Hall who, together with the late Charles D. Lee, prepared Schedule 1 identifying the lands which formed the basis of the settlement in Case No. 46640.

23. Dr. Wilkinson testified that he was attorney of record for the Confederated Bands of Ute Indians in Case No. 46640 and in the related Case No. 45585, and as such was familiar with the course of negotiations leading up to the settlement of Case No. 46640, as well as Case No. 45585. He noted that Royce Area 616 was involved in both Cases Nos. 46640 and 45585. In Case No. 46640 the Confederated Bands were suing for compensation for lands that had been disposed of in Royce Area 616 prior to 1938. In Case No. 45585 they were

suing for compensation for lands that were undisposed of in 1938 and were taken by the Act of Congress of June 28, 1938 (52 Stat. 1209).

24. Dr. Wilkinson testified that the schedule of land disposals forming the basis of the settlement in Case No. 46640 (the aforementioned Schedule 1) was prepared by Georgette Betor (now Georgette Betor Lee Hall) and Charles D. Lee, who were hired with the approval of the Court of Claims and the Department of Justice. Miss Betor and Mr. Lee were specifically instructed to list only lands located in Royce Area 616 and not those in Royce Area 617 because, according to Dr. Wilkinson, referring to his legal conclusion at the time the list was made, "in our judgment the lands in 617 were taken under the Act of 1895 from the Southern Utes whereas the lands in 616 which were included in the stipulation were taken under the Act of 1880 from the Confederated Utes."

Dr. Wilkinson also testified that he hired Miss Georgette Betor and Mr. Charles D. Lee to prepare a list of disposals of lands involving the Southern Ute Reservation, located in Royce Area 617, separate and apart from the list of disposals of land which they prepared for Case No. 46640. Dr. Wilkinson stated that at the time of settlement of Case No. 46640 he had two lists of land disposals in hand:

(a) the list of disposals in Royce Area 616 which became Schedule 1 in Case No. 46640, and

(b) the list of disposals of the Southern Ute lands in Royce Area 617 which was used as a basis for preparing the petition in Indian Claims Commission Docket No. 328.

25. Dr. Wilkinson testified that in his judgment the reason the word "diligence" was employed in the stipulation in Case No. 46640 was to insure that any small areas of land not included in Schedule 1 of the stipulation would be covered by the judgment. He testified further that "diligence" in his opinion would not have permitted the exclusion of an area of 360 sections of land, an area equivalent to one mile wide and 360 miles long.

26. After Schedule 1 of the stipulation had been prepared by Miss Betor and Mr. Lee, it was submitted to

the Department of Justice for verification. Some errors were found by the Department and Schedule 1 was accordingly corrected. A letter dated May 8, 1950, from C. V. Marmaduke, Jr., Special Assistant to the Attorney General, Lands Division, tends to corroborate Dr. Wilkinson's testimony as to his intention of including the following language in the stipulation: "So far as the parties with due diligence have been able to determine these descriptions in Schedule 1 represent all of the land so disposed of and set aside." The letter, relating to Case 46640 reads as follows:

> "Sir:
>
> "In a recent telephone conversation Mr. Sonosky of the Department requested an opinion on the advisability of making a complete check of the land descriptions furnished by the plaintiffs in the above case.
>
> "While numerous errors were disclosed by the 10% spot check of the land descriptions, yet it appears that a complete check would not be warranted because the draftsmen's estimate of the amount of acreage erroneously described would be small. * * *"

27. Dr. Wilkinson, after testifying as to the steps he had taken to refresh his recollection, testified as follows in describing his intention in signing the stipulation in Case 46640:

> "Well, it was clearly my intention in signing the stipulation for the Confederated Bands of Ute Indians that it relates only and solely to the lands in Area 616 and did not relate to the lands in 617 which was to be the basis for a separate suit which we were preparing at the time. We had, of course, Miss Betor and Mr. Lee prepare the list in 616 and also the list in 617 and to the extent that you can read the mind of attorneys on the other side, I give it as my judgment and opinion that they were of the same opinion because, in discussing the schedule No. 1 which is attached to the stipulation we always discussed it solely with reference to the land in 616 and not in 617."

28. A letter from Dr. Wilkinson to Miss Betor and Mr. Lee, dated January 25, 1950, employing them to prepare a schedule of lands in Royce 617 in the same manner in which they prepared Schedule 1 for Royce 616, would tend to corroborate the testimony of Mr. Wilkinson. The relevant language reads as follows:

"It is possible that we may not be able to include the above claims under any of the suits we now have pending. If not, we will have to institute new suits, which we will do, however, immediately on your completing your work, and they can be completely prosecuted as quickly as if suit had already been filed. Please therefore be in keeping your record of time use the above caption on this letter."

29. A. Devitt Vanech and Marvin J. Sonosky signed the stipulation for the defendant. Mr. Vanech is dead. Also one of the principals for the Government, Mr. Robert E. Mulroney, then Chief of the Trial Section, Lands Division, Department of Justice, is dead. Mr. Marvin J. Sonosky filed an affidavit with the Commission. He stated he was the attorney in charge of the Ute litigation identified as Cases 45585, 45783, 46640, 47564 and 47566, all in the United States Court of Claims. He stated that in 1950 he prepared for the consideration of the Assistant Attorney General memoranda to the Attorney General recommending settlement; that he did not retain and does not have a copy of the memoranda of settlement or any other settlement papers; that he does not have any independent recollection of whether the settlement included the extinguishment of any claims for the Colorado reservations lands known as Royce No. 617.

30. In conclusion it was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the Government. The only inference that can be drawn as to their intention was the testimony of Dr. Wilkinson that at no time during the long period

of negotiation did either he or the attorneys for the Government discuss the question of disposition of Royce Area 617.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

/s/ John T. Vance
JOHN T. VANCE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

/s/ Margaret H. Pierce
MARGARET H. PIERCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

[Title Omitted in Printing]

* * * *

ORDER TRANSMITTING FINDINGS OF FACT TO THE COURT OF CLAIMS

This matter comes before the Commission at this time on an order entered by the United States Court of Claims on May 15, 1967, remanding this case to the Commission to hear additional evidence, including but not limited to testimony of the signatories to the stipulation in Court of Claims Case No. 46640, and to make and report to the Court of Claims findings of fact on the question as to whether by said stipulation, it was the intention of the

parties thereto that the final judgment entered in Court of Claims Case No. 46640 would be *res judicata* as to the lands involved in this case. Pursuant to the Court of Claims order the Commission has this date entered supplementary findings of fact numbered 21 through 30 and

IT IS ORDERED that the findings of fact made by the Commission pursuant to the order and remand from the Court of Claims are hereby transmitted to the Court of Claims.

Dated at Washington, D. C., this 27th day of June, 1969.

/s/ Jerome K. Kuykendall
JEROME K. KUYKENDALL
Chairman

/s/ John T. Vance
JOHN T. VANCE
Commissioner

/s/ Richard W. Yarborough
RICHARD W. YARBOROUGH
Commissioner

/s/ Margaret H. Pierce
MARGARET H. PIERCE
Commissioner

/s/ Brantley Blue
BRANTLEY BLUE
Commissioner

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 7-66

Ind. Cl. Comm. Docket No. 328

17 Ind. Cl. Comm. 28

21 Ind. Cl. Comm. 268

(Decided March 20, 1970)

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

W. Braxton Miller, with whom was *Assistant Attorney General Shiro Kashiwa*, for appellant.

Glen A. Wilkinson, attorney of record for appellees. *Wilkinson, Cragun & Barker*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

This case comes to us on appeal from a decision of the Indian Claims Commission which, in an interlocutory order dated May 16, 1966, found the appellant, the United States, liable to the appellee, the Southern Ute Tribe or Band, for (1) just compensation for taking 230,547.44 acres of land, and for (2) a "further and complete" accounting for funds held in trust. Although notice of appeal was filed on August 4, 1966, after briefing and oral

argument we remanded to the Commission for supplemental findings of fact. Upon making the requested findings the Commission again transmitted the case to us, whereupon the parties, relying on earlier submitted briefs, again presented oral argument. Since the Commission's supplemental findings tended to support its original decision, the issues now on appeal are those previously posed.

The Southern Utes, an incorporated tribe composed of the Moache and Capote bands, allege that the United States violated a treaty agreement made with their ancestors and ratified by Congress in 1895. Briefly, the terms of the treaty, which are not in dispute, provided that the western sector of the Southern Ute reservation be set aside for all those who would not accept allotments in severalty. The eastern sector was for Southern Utes who would accept allotments. The unallotted lands in this latter sector were to be opened to white settlers for the cash price of not less than $1.25 per acre. All proceeds, save certain offsets, were to be held by defendant in trust for the exclusive benefit of the Southern Utes. In April 1899, these lands were officially opened to public entry (31 Stat. 1947). In May 1900, however, Congress passed the Free Homestead Act (31 Stat. 179, 43 U.S.C. 179) which allowed settlers to obtain this land without monetary consideration. The Southern Utes now seek just compensation for 230,547.44 acres of their land that defendant thus donated to homesteaders in violation of the 1895 treaty. Defendant's primary defense is that all claims relating to these free land dispositions have been settled finally by prior adjudication. We disagree with this contention for the reasons stated in the following discussion and analysis.

In the mid-1800's, the Ute Indians occupied an extensive region which spanned western Colorado, northern New Mexico and Utah. On March 2, 1868, these Indians —the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Utes—ceded their aboriginal lands to the United States in exchange for a 15.7 million acre reservation situated wholly within the boundaries of Colorado. (Treaty of 1868, 15 Stat. 619, 2 Kappler 990). Subsequently, the bands came to be

known under different names: The Tabequaches were called the Uncompahgre Utes; the Moache, Capote *and* Weeminuche, the Southern Utes; and the Yampa, Grand River and Uintah, the White River Utes. Collectively these three Bands were informally organized and styled as the Confederated Bands of Utes.

Some years after the Treaty of 1868 another agreement was forged—the Brunot Cession of 1873. (18 Stat. 36, 1 Kappler 151). The discovery of large and valuable mineral deposits on the Ute Reservation had prompted the United States to persuade the Confederated Bands to cede 3.7 million acres of the east-central portion of their reservation. The relevance of this agreement lies in the geographical consequences it effected. (For convenience, in referring to these geographical sectors we will use the Royce Area numbers taken by the parties form Charles C. Royce's Map of Colorado (1) *Indian Land Cessions* (18th Ann. Rep., B.A.E. 1896-1897, Part II)). By carving out this slice of land (Royce Area 566), the cession nearly severed the original 1868 reservation into two disproportionate parts. Royce Area 616, the larger part, lay mostly north of 566, but a corridor 20 miles across ran north and south between 566 to the east and Utah to the west. Wedged between the New Mexico border and the southern boundary of the Brunot Cession, however, was the remainder of the reservation (Royce Area 617). This narrow strip, 15 miles across, ran from the reservation's eastern boundary to a point just 20 miles short of the Utah border, its western boundary. The occupants of Royce Area 617 were and still remain the Moache, Capote and Weeminuche Bands, then known as the Southern Utes.

By another agreement ratified by the Act of June 15, 1880 (21 Stat. 199, 1 Kappler 180), the Confederated Bands ceded, or purported to cede, with certain exceptions, the remainder of their diminished 1868 reservation. Because of the critical importance of this cession, we quote the pertinent sections verbatim.

* * * *

The * * * chiefs and headmen of the confederated bands of Utes * * * agree and promise to use their best endeavors with their people to procure their consent *to cede to the United States all the territory of the present Ute Reservation in Colorado, except* as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

* * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians *in severalty* * * *.

* * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities * * *, and so much more as Congress may appropriate for that purpose; and that *a commission shall be*

sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with [other necessities], and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: *One-third to those who settle on the La Plata River and vicinity [the Southern Utes]*; one-half to those settling on Grand River and vicinity [Uncompahgre Utes], and one-sixth to those settling on the Uintah Reservation [the White River Utes].

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and [otherwise provided by law or treaty], agree to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies for the Uncompahgres and Southern Utes be removed to and established at suitable points, to be hereafter selected, upon the lands to be set apart, and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Fifth. [Prior treaties are reaffirmed.]

* * * *

Sec. 2 [Five Commissioners were authorized to present the agreement to the Utes for their ratification, and upon ratification to assess improvements and take a *census* of the Southern Utes, Uncompahgre Utes, and White River Utes]. * * * [A]nd they [commissioners] shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this Act.

* * * *

Sec. 3. *That the Secretary of the Interior be* * * * *authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement and severalty of said Indians as therein provided.* And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement * * * and whenever the report and proceedings of said commissioners * * * are approved by the President * * *, he shall cause patents to issue to each and every allotee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, *and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands,* at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; *but shall*

be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at [$1.25] per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided in this act: * * *. (Emphasis supplied throughout, except usual statutory italics.)

* * * *

The most significant aspects to be gleaned from this Act, with respect to our analysis, is that the Confederated Bands (Southern Utes included) seemed to cede their *entire* Colorado reservation—Royce Area 616 *and* 617—and moreover promised to accept allottments in severalty in various sectors within and beyond reservation boundaries. As sole consideration for these promises, the Bands were to receive shares in the proceeds of unallotted land sales remaining after certain Government reimbursements. The Southern Utes were apportioned a one-third share and like their confederates understood that such monies would be held by defendant in trust for their benefit. The Commission found that the Act of 1880 "reserved" Royce Area 617 for the Southern Utes. Although the plain language of the Act appears inconsistent with this finding, the following sequence of events capped by the Act of 1895 and Restoration of 1938 (both discussed *infra*) support the conclusion that plaintiffs at any rate did not cede their reservation (Royce Area 617) under the agreement of 1880.

Pursuant to the above act the Ute Commission was formed under the leadership of chairman George W. Manypenny. On November 21, 1881, the Commission submitted its report to the Secretary of the Interior (H.R.

Doc., Vol. 10, Ser. No. 2018, 47th Cong., 1st Sess. 383 (1882). Divided into three subreports, one for each band in the confederated trio, the report discloses that the removal of the Uncompahgre and White River Utes was not accomplished without some difficulty. Both bands, despite the terms of the above treaty, resisted removal with vehemence. Finally, however, they were persuaded to settle in Utah, outside the bounds of their former reservation. The Southern Utes, on the other hand, were to receive different treatment as forecast by the comments of Chairman Manypenny:

* * * *

> When I went to the Southern [Ute] Agency, I found the prevailing opinion was that all the Southern Utes by the terms of the [1880] agreement were to be removed to and located on the La Plata River in Colorado and New Mexico. It was confidently expected that in a brief time the valleys of the Animas, Florida, and Las Pinos, &c., would be open to occupation and settlement by white people. The settlers in these valleys north of the reservation were impatient to enter and possess the land; and when it became known that I had instructed the contractors for surveying, on the completion of their work on the La Plata to pass over to and commence work on the Animas and Florida, there was not only disappointment, but great dissatisfaction manifested. It was asserted that I had deliberately perverted the language of the [1880] treaty and committed a great wrong.
>
> Under the terms of the agreement there was no other land in Colorado that I could have selected upon which to locate these Southern Utes. This I regard as a great misfortune, since their close proximity to the white settlements in the valleys of the streams on which they are to be located will subject the Utes, after their lands are assigned to them and patents issued, and the residue of the lands are opened to occupation and settlement, to constant annoyance by evil-disposed persons.

* * * *

> * * * During my stay on the reservation I took occasion * * * to talk to the leading men * * * on the subject of their location in severalty. In these conversations I called their attention to the fact that the work the surveyors were doing was the preliminary step to such location [in severalty] and the placing of each family on its own land. On many occasions all that I said was listened to without a single word in response, and I did not find one who desired a house, or would agree to dwell in one if built for him on his own land. It will take time and careful management to induce these Indians to abandon their present [way of living] and adopt the new mode of life contemplated by the agreement.
>
> In the meantime, and while the change is going on, they must be protected from annoyance. Intruders must be prevented from going in among them. If this be not done disorder will eventually reign, and all efforts to domesticate them will fail. *To prevent intrusion and guarantee proper order and protection, I can see no other way than to so modify the* [1880] *agreement, so far as these Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein. Then the land selected, and upon which the Indians are to be located, can be kept free from intruders. Id.* at 393. (Emphasis supplied).

Although we stated earlier that the plain words of the 1880 treaty seemed to indicate that the Southern Utes agreed to cede their lands to the United States, Manypenny's recitals give us some pause. They show that both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures. By suggesting that the reservation be closed to public entry indefinitely, Manypenny impliedly suggests that the United States forego, albeit not permanently, its rights under the 1880 treaty vis a vis the Southern Utes. Significantly, Manypenny's recommendation to modify the

1880 treaty was accepted by the full commission. The record contains, however, no official acknowledgement or response.

Consequent to the departure of the Uncompahgre and White River Utes from Royce Area 616, Congress promulgated the Act of July 28, 1882 (22 Stat. 178), which declared all of Royce Area 616 as public land to be disposed of in accordance with the Act of 1880. Section 2 of the Act of 1882 provided, however, that the Secretary of the Interior "at the earliest practicable day, ascertain and establish the line betwen [Royce Area 616 and the land] now or lately occupied by the Southern Utes * * *." Five hundred dollars was appropriated for this survey. Section 3 provided among other things that the land opened in Royce Area 616 would only be disposed of on a cash basis not less than $1.25 per acre.

Plaintiff argues that by section 2 of the above act the United States formally recognized the thin strip of land (Royce Area 617) as the exclusive reservation of the Southern Utes. Defendant explains this survey as merely an attempt to cordon off the Southern Utes' land "until they could be located in severalty."

To implement the Act of 1882 the Secretary of the Interior was obligated to instruct the district land offices in Royce Area 616 how to accomplish disposal. From the text of a letter dated August 4, 1882, which ostensibly was sent out for this purpose under the approval of the Secretary of the Interior (Report of the Sec. of Int., Vol. 1, H.R. & Sen. Message & Doc., 47th Cong., 2d Sess. 41 (1882)), we have the following:

* * * *

> The second section of the act of 1882 provides for a survey of the line between the lands occupied by the Southern Utes and the Ute lands exposed to entry by the act [of 1882]. The following is a description of the line which is laid down on said map: Commencing *at* the southwest corner of the Ute *ceded* lands; thence extending the south *boundary* of the Ute *ceded* lands to the western boundary of the State of Colorado. (Emphasis supplied).

From this description it would seem that the Interior Department at least was already viewing the Southern Ute territory as a permanent reservation not ceded under the terms of the 1880 cession. Specifically, the letter states that the survey line commence *at*, not *in*, the southwest corner of the ceded Ute land. Adhering to defendant's contention that *all* the lands were ceded in 1880, a literal interpretation of this letter would lead to an anomalous result. If the starting point was placed *at* the southwestern corner of Ute ceded land, the point would coincide with the converging point of the New Mexico, Colorado and Utah borders. The line could not extend to the western boundary of Colorado because it would start there.

It is also interesting to note how the Southern Utes themselves regarded their status during this time. In February of 1886, Ignacio, the principal chief of the Southern Utes visited Washington, D.C., along with several other of his subordinate chiefs and headmen, and appeared before the Senate Committee on Indian Affairs. The following is a colloquy between the committee and Buckskin Charley who although a subordinate to Ignacio, seemed to perform as spokesman for the Southern Utes (Sen. Rep. No. 836, 49th Cong., 1st Sess. 1-2 (1886)):

> Question. Why do you come here for?
> Answer. We come here to see if we cannot exchange our reservation for another.
> Q. Where do you want the new reservation located?
> A. We want to go west of the present reservation.
> Q. Why is it better to go that way?
> A. The present reservation is narrow and long and we want to go west *and see if we can't sell it.*
> Q. Do you come to Washington with the idea that the Indian Bureau can do what you want?
> A. We come expecting to get legislation.
> Q. You hold title under statute?
> A. *Yes. Id.* (Emphasis supplied).

Thus the Southern Utes were still in possession of their part of their old reservation under claim of right. The Southern Utes wanted to quit their reservation for a number of reasons. These were pastoral people not inter-

ested in farming—the li
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amount of arable land.
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Secretary of the Interio
Atkins, Commissioner of
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ivelihood which the Government adopt. Even if they willing to n encompassed an insufficient They complained also that the and the location too isolated from neighbors. Their principal lament, sing encroachments by neighbor- equent to the Brunot Cession of 2 opening up the bulk of the Utes' ere was an influx of white set- he Southern Ute reservation. To New Mexico, which was also being us the Indians were wedged be- unities whose routes of trade and everal rivers traversing the reser- was in a quandary. In a report to ior dated April 5, 1888, J. D. C. f Indian Affairs acknowledged the o. 836, *supra*, at p. 3):

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> to impossible to close up the thor- he reservation. To do that would be wall" 110 miles long, virtually cut- and intercourse between the large nmunities on either side of the res- as a matter of fact, we are bound tipulations [Sec. 2 of Act of 1882?] s to prevent white people from en- ossing said reservation.

Two bills were subse
S. 769 and S. 1916—
Southern Utes from th
never enacted into law
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pler 266) reads as fol

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equently introduced in the Senate—to effectuate the removal of the their reservation. These bills were and it was not until 1888 that the e steps to ameliorate the Indians' e Act of 1888 (25 Stat. 133, 1 Kap- ollows:

> of the Interior is hereby authorized
> mmission * * * with authority to
> he band of [Southern] Ute Indians
> nodification of their treaty [1880?]

> and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of [Southern] Ute Indians * * * if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; * * *.

Plaintiffs assert that this act confirmed the "separation of the Southern Utes, as an entity, from the Confederated Bands * * *." That the Government negotiated exclusively with the Southern Utes for the "exchange of their reservation", is construed by plaintiffs "as a further Congressional recognition that the 15 mile strip [Royce Area 617] was the sole and absolute property of the Southern Utes and that they alone had the right to dispose of it." Perhaps believing it to be damaging to its case, defendant omits all reference to this act in its brief. Although the language of this act tends to favor plaintiffs' position it is by no means conclusive. It merely authorized the establishment of a commission to engage the Southern Utes in negotiations for the purpose of persuading them to do belatedly what the Uncompahgre and White River Utes had done some years earlier, namely, to vacate their reservation and move elsewhere. A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory. The agreement which emerged pursuant to this act substantiates this view. The Southern Utes agreed, *for no additional consideration*, to give up their reservation and remove and settle upon a reservation in San Juan County, Utah. Presumably, their evacuated reservation lands would then be sold in accordance with the Act of 1880 and the proceeds would be held for the collective benefit of the Confederated Bands in the prescribed proportions, that is, the consideration vis-

ualized in the 1880 agreement as accruing to the Southern Utes would still accrue.

Although routinely introduced, this agreement failed to receive Congressional approval; for six years it remained in limbo much to the dismay of the Southern Utes who continued to occupy their besieged reservation. In 1894 it was again introduced. Conceding the "anomalous position [of the Southern Utes] of having ceded their reservation and yet remaining on it", the Senate Committee on Indian Affairs favored ratification (Sen. Rep. No. 279, 53d Cong. 2d Sess. 2-3 (1894)). Its House counterpart, although concurring in the view that the Southern Utes presented an anomalous situation, did not assent to ratification (H.R. Rep. No. 799, 53d Cong., 2d Sess. 2-3 (1894)). It believed that the proposed reservation was too large for the Southern Utes and hence would encourage their nomadic ways. Therefore, instead, the House Committee recommended enactment of a pending bill which was eventually passed as the Act of February 20, 1895 (28 Stat. 677). The stated purpose of this Act was to annul the agreement of 1888 and enforce the treaty of 1880 which sought to settle the Indians in severalty. Since this, too, is a very important Act, the pertinent language will be quoted verbatim:

* * * *

> Sec. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of [1880] * * * and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.
>
> Sec. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in sev-

eralty, as provided in the preceding section, there shall be * * * set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to [certain government rights] * * * ; and the Goverment shall maintain an agency at some suitable place on said lands so reserved.

Sec. 4. That at the expiration of six months from the passage of this Act the President * * * shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws * * *; but no homestead settler shall receive a title to any portion of such lands at less than [$1.25] per acre, and shall be required to make a cash payment of 50 cents per acre at the time filing is made upon any of said lands: [certain provisos follow] * * *.

Sec. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars as follows: Five thousand dollars annually for ten years * * * to be divided equally among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; [certain allotments also made to specific chiefs and headmen] * * *; *that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the*

United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

Sec. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe. (Emphasis supplied.)

The Southern Utes could have allotments in severalty in Area 617, those who did not take these would move to a reservation in the western sector of Area 617; unallotted eastern sector lands would be sold not donated to homesteaders, for the Southern Utes' benefit. Unlike the Act of 1888, the Act of 1895 employs language ostensibly consistent with the Act of 1880 but it effects a conflicting result with the latter. We said earlier that by the plain terms of the Act of 1880, the Confederated Bands including the Southern Utes agreed to cede their entire Colorado reservation (Royce Area 616 and 617) for consideration. Under the Act of 1895, however, the Southern Utes separately ceded all over again a part of their reservation (Royce Area 617) in exchange for an *exclusive* and *additional* consideration! Section 5 not only states that the balance of land sales proceeds, deducting certain Government expenses shall be held in the U.S. Treasury for the sole use and benefit of the Southern Utes, but also that no offsetting reductions should be made in their rights under prior treaties because of this consideration. The meaning to be ascribed this section is a focal point of controversy between the parties.

The Commission found, subscribing to plaintiff's position, that the United States after the Act of 1880 pursued a patterned course of conduct which at all times regarded the Southern Utes as the rightful owners of Royce Area 617. This conduct culminated in the agreement of 1895 which the Commission viewed as an "ultimate act"

recognizing plaintiffs' ownership rights. Defendant contests this appraisal by offering one of its own. It contends that the additional consideration was actually "special benefits" gratuitously given the Southern Utes to induce them to take lands in severalty. The benefits, defendant admits, were proferred "at the expense of the United States and other Ute Bands."

Although it is debatable, we believe the evidence weighs substantially in favor of the Commission's interpretation. We are not persuaded that defendant's post 1880 conduct followed any clear direction. It was ambivalent, with some actions favorable to plaintiffs' case and others not. During all this time, however, the fact remains that the Southern Utes were allowed to remain on their surveyed reservation for 15 years after the purported cession, and the right to remove them without their further consent was not asserted or exercised. Here we have an interpretation given to the 1880 treaty by both parties thereto. Congress recognized this anomalous situation and deemed it necessary to tender new consideration for the land. Defendant's "special benefits" theory is supported neither by the express language of the Act nor by the legislative history surrounding its passage. Although earlier reports described the Uncompahgre and White River Ute removals as somewhat hostile, due to their unwillingness to leave, Congress did not think it necessary then to encourage their exodus with monetary inducements. On the contrary, it was reported by the Commissioner administering the White River Utes that military force was contemplated in accomplishing their withdrawal. (H.R. Doc. Ser. No. 2018, *supra*. Given the relations which existed between the United States Government and American Indians during this period it is difficult now to view the former as acting *ex gratia* wholly. The Southern Utes at that time, numbered slightly over 1,000. Certainly, if the United States wanted to make a gift it could have done so and still fallen far short of the promises embodied in section 5.

The more tenable theory, in our estimation, is that Congress recognized that by its protracted acquiescence in the Southern Ute occupation, Government rights to the land

had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead. It may be that the obligation to deal justly and honorably with the Indian wards did not allow insistence on full implementation of the apparent terms of the 1880 agreement. On the other hand, the Southern Utes obviously did not see themselves as mere squatters. The Congress therefore decided that if the land was going to be acquired free and clear new consideration was necessary. Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880.

This position is bolstered by the Restoration of 1938 (5 Kappler 659), which the Commission found as defendant's second ultimate act in recognizing plaintiffs' ownership rights. In an order by the Secretary of the Interior issued pursuant to sections 3 and 7 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) the Southern Utes were restored to their tribal ownership of all lands not disposed of under the Act of 1895. The first paragraph of this order reads as follows:

> * * * [P]ursuant to the provisions of the Act of February 20, 1895 * * * the Southern Ute Band of Indians in Colorado *ceded* to the United States a large area of their reservation in the State of Colorado established *expressly for their benefit under the treaty of June 15, 1880* * * *. (Emphasis supplied).

Thus, defendant's officials do not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement. Such a statement by an executive agency bearing on the meaning of a treaty must be accorded great weight. *Creek Nation East of the Mississippi* v. *United States*, 165 Ct. Cl. 479, 486, *cert. denied*, 379 U.S. 846, *reh. denied*, 379 U.S. 918 (1964).

I.

A. Defendant's principal contention that the Southern Utes' claims have been finally settled by prior adjudica-

tion evaporates in the presence of our conclusion. The cases upon which it relies, namely the 1910 accounting case No. 30360 (45 Ct. Cl. 440 (1910)) and the 1950 settlement case No. 46640 (117 Ct. Cl. 433, 436 (1950)), were both intended to settle claims arising out of the 1880 cession exclusively. The Jurisdictional Act of 1909 (35 Stat. 788) which enabled this court to hear the accounting claim of the Confederated Bands was expressly limited to claims arising out of the Act of 1880. Hence any claims exceeding the limits of this mandate which were adjudicated in the 1910 accounting were improvidently heard. Not so limited was the Jurisdictional Act of 1938 (52 Stat. 1209) which authorized the 1950 settlement cases. On the contrary, this act conferred jurisdiction upon us to adjudicate *all* legal and equitable claims which the Ute Indians or any individual tribe or band thereof may have against the United States as to claims arising under *any* treaty of the United States. The stipulation—the bulwark of defendant's case—upon which we entered judgment in case No. 46640, however, was qualified as follows:

> * * * [T]he judgment to be entered in this case is *res judicata* * * * as to any land formerly owned or claimed by the plaintiffs [Confederated Band of Utes] in western Colorado, *ceded to defendant by the Act of June 15, 1880* * * *. (Emphasis supplied.)

The stipulation recited numerous parcels in 616 and none in 617, though an effort was made for the list to be comprehensive. Since the Commission originally found that the agreement of 1880 only ceded land in Royce Area 616 it concluded summarily that this stipulation did not extinguish the instant claims.

We remanded this case to get a better idea of exactly what the parties meant to stipulate in 1950, namely, what they *then* thought was ceded by the Act of 1880. As reflected in the Commission's supplemental findings, plaintiffs' witness, a signatory to the stipulation and the then attorney of record for the Confederated Bands, gave testimony entirely consistent with the Commissioner's original findings. Defendant, however, insisting that the stipulation was self-explanatory and that the intent of

the parties would have to be discerned from the written instrument, declined to put on witnesses. Of the Government signatories, only one is still living—Marvin J. Sonosky, Esquire, who is a member of our bar and is now in private practice. Having no independent recollection of the precise extent of the stipulation, Mr. Sonosky was unable to give useful testimony. He did indicate, however, in an affidavit submitted to the Commission, that as the attorney in charge of the 1950 Ute litigation he prepared a memorandum recommending settlement. Defendant withheld from the Commission this memorandum and related papers declaring them to be the work products of the attorneys of the Department of Justice and therefore privileged under Order of the Attorney General No. 381-67 (July 4, 1967).

We have recently considered in *Weiss* v. *United States*, 180 Ct. Cl. 863 (1967), the question of privilege for papers and opinions prepared by attorneys in the executive branch. The topic is comparatively new and the case law still scanty. We do not believe the privilege should extend beyond the reasons for its existence, which are the freedom of the officials to receive staff advice in confidence, and the reluctance of courts to allow counsel in any lawsuit to raid and use the work product of his adversaries. Mr. Sonosky apparently needed to refresh his memory only, and introduction of his report in evidence was unnecessary. He was not in the employ of plaintiffs. The officials to whom Mr. Sonosky submitted his report, and who approved it, being dead, could not now be embarrassed. The report was not prepared for use in trial of the current or any then pending litigation, but was apparently to explain and justify a settlement. It certainly seems more than questionable whether executive privilege does or should apply to consultation by a witness of a document he himself has prepared, for the purpose of refreshing his memory. If defendant is right, by consistency it should have a privilege to muzzle Mr. Sonosky in case his memory should be adequate without refreshment, yet no such right is claimed or can be imagined. Defendant in this instance has clearly not done all it might have done to clear up any uncertainty there

may be about the intent of the parties to the stipulation. We think we are justified in inferring that neither party intended the stipulation to apply to Area 617. The most that can be said is that, by referring to territory ceded in 1880, the stipulation might have been intended to refer to the unexecuted, negated cession of Area 617, or it might not. If we must, as defendant urges, confine our view to the stipulation itself and other papers in that case, we find insufficient reason there to hold it applies to areas not *effectively* ceded. If we have a right to inquire directly into the understanding of the parties at the time, to resolve an ambiguity, defendant's handling of the Sonosky memorandum is pregnant with the admission that Mr. Sonosky, his memory refreshed, would not testify favorably to defendant. Since plaintiffs' testimony was unequivocal and no reason is suggested for disbelieving it, we conclude that the parties never intended the stipulation to apply to Area 617, and therefore it did not so apply.

B. Defendant's second defense is that plaintiffs, the Southern Utes who now only consist of the Moache and Capote bands, are not the exclusive owners of these claims. Specifically it contends that either the Uncompahgre and White River Utes have a joint interest in these claims, or alternatively that the Weeminuches, now known as the Ute Mountain Utes, are co-owners with plaintiffs. Because of this alleged failure to join interested parties, defendant, without citing precedent or other authority, urges reversal.

Responding to the first assertion, we find that the Uncompahgre and White River Utes have no interest in the instant claims. The 1895 agreement was made between the United States and the Southern Utes and only the latter were to have any share in proceeds. However apparently inequitable it may have been to grant the Southern Utes joint interest with the Uncompahgre and White River Utes in the Area 616 proceeds and then give them exclusive interest in Area 617 proceeds, this was the stated intent of Congress not to be disturbed presently by this court. Any claim these tribes might raise against the Government to redress this matter would emanate from a right other than that of beneficiaries under the Act of 1895.

Defendant's second contention, raises a more perplexing question. Plaintiffs insist that the Weeminuches, by accepting the western reservation offered in the 1895 agreement, relinquished all claim to any land in the eastern sector. By accepting allotment in the east, the Moache, and Capote similarly relinquished claims to western lands. Hence, plaintiffs assert that since the instant claims all arise out of eastern land dispositions, they, by this mutual exchange, own the exclusive rights. The Commission, without referring directly to this cross-relinquishment theory, concurred in plaintiffs' conclusion, 17 Ind. Cl. Comm. at p. 52, saying:

> * * * [A]ny claim which the Ute Mountain Utes might have * * * would be *separate* from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation. (Emphasis supplied).

Fortunately, we can decide this issue without reaching the merits. Although the Commission's rules of practice and procedure were then and still are silent as to joinder questions, we hold that joinder of parties before the Commission is required only if the joint interest is existing. Assuming *arguendo* that the Ute Mountain Utes once owned an interest in this claim, we believe that they forfeited it by failing to timely file a claim before the Commission. Not only is this holding literally consistent with our own Rule 62 (a) which dictates joinder of any persons "*having* a joint interest adverse to the United States" (Emphasis supplied) but, it also does no violence to the salient concepts which underlie the joinder of "indispensable" parties rule. By rendering a judgment for plaintiffs, we do not prejudice the claim of the absent Ute Mountain Utes since their claim is no longer extant. Accordingly, consequent to such judgment, defendant will not suffer any inconvenience or harassment of further litigating this issue. We therefore hold that the Southern Utes, consisting of the Moache and Capote Bands, are *presently* the sole and exclusive owners of the instant claims. Hence they are eligible to pursue their remedy without additional parties.

C. Defendant conceded at oral argument that should we find that plaintiffs' claims were not extinguished by the 1950 settlement, and should we find plaintiffs the sole owners of their claims, then it is liable for gratuitously giving away plaintiffs' land. Questions of quantum, however, are still raised by defendant. First, it contends that the Commission's finding that defendant is liable to compensate for 230,547.44 acres is not supported by substantial evidence. Second, in order to avoid payment of interest, it says it is liable, if at all, for breach of contract, rather than to pay just compensation for a 5th amendment taking.

Deferring the acreage issue for the Commission, we now explore the nature of defendant's liability. Plaintiffs argue that under the 1895 Act their ancestors ceded whatever interest they had in their lands in trust to defendant in exchange for a beneficial interest in the proceeds. Sustained by the Commission below, plaintiffs assert that the free disposal of their lands with no substitute consideration offered by defendant was a taking under the 5th amendment entitling them to the just compensation. Plaintiffs, in support of their position, cite several cases, but the one we find to be most in point is *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 430 (1943).

Attached to the Jurisdictional Act of 1938, *supra*, was the so-called Adams Amendment which declared certain Ute land ceded under the Act of 1880 but not disposed of "to be the absolute property of the United States". In *Confederated Bands*, *supra*, we started with the proposition that "[t]he interest and obligations created by the agreement of 1880 do not fit readily into conventional legal concepts, such as trusts, agencies, debts or *contractual* obligations, and mortgages or security interests.", (p. 425), (Emphasis supplied). We went on to comment that "[t]he problem [was] further complicated by the fact that one of the parties * * * was a sovereign which could and did, regardless of the terms of the agreement, do what it pleased with the lands and their proceeds, giving the Indians the privilege of having their legal rights determined only at long intervals * * * when the sov-

ereign deigned to waive its immunity from suit.", (p. 425). In short, this was not the typical arms length contract relationship. Declining to consider whether the Government assumed the duty of trustee, we found that the Indians under the agreement of 1880 retained an interest in the land—the right to the proceeds from sales—and that this interest was destroyed by the enactment of the Adams Amendment. Given these circumstances we held the destruction of this right to be a taking under the 5th amendment. Presently we are confronted with a like set of circumstances. The agreement of 1895—patterned after the 1880 agreement—embodies rights and interests which similarly evade accurate legal classification. Again, as in *Confederated Bands*, we have a situation where the Government cavalierly exercised its sovereign power without giving thought to providing consoling justification, let alone immediate chance for redress. By the Free Homestead Act of 1900 (31 Stat. 179) defendant promised that "all sums of money so released [herein] which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States * * *." By failing to make good this legislative promise of substitute consideration, defendant, in effect, dealt with plaintiff's land as its absolute property. Guided by our reasoning in *Confederated Bands*, we hold that plaintiffs, under the agreement of 1895, retained an interest in the ceded lands, namely, the right to receive sales proceeds or the equivalent thereof. As in *Confederated Bands*, this interest was destroyed by defendant's exercise of sovereign power. We hold therefore that the free disposal of the lands was a taking of plaintiffs' property right under the 5th amendment entitling them to just compensation.

This holding is not in conflict with *Confederated Salish & Kootenai* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966). The pertinent facts of that case are as follows: The Government in 1904 enacted legislation which authorized using plaintiff Indians' monies, held in trust, to defray the expenses of surveying their land. Since we had earlier found that by a prior treaty the Government had obligated itself to assume the cost of surveying, 167 Ct. Cl. 405 (1964), the issue subse-

quently presented was whether its use of Indian trust funds in violation of the treaty was a taking under the 5th amendment. We rejected this claim for two reasons: First, we noticed that since "legal title to the funds on deposit in the Treasury lay in the United States * * * [the] Indians' interest was, at most, that of a beneficiary, and a trustee's failure to live up to the standards imposed upon him is not a taking of title from the cestui but a breach of obligation.", 175 Ct. Cl. at p. 455. Our second reason, however, raised an even "deeper objection": "Money in the Federal treasury, even on deposit, cannot be simply equated with private property. Where such funds are involved it requires extraordinary circumstances, not present here, to find an eminent domain taking in a withholding or use of money by the Federal Government.", at pp. 455-56. We then proceeded to discuss the anomalous consequences plaintiffs' theory would engender with regard to "claimants who could show some sort of title to funds in the Treasury" and those who could not. We noted further that "[m]ere form sometimes has meaning, but usually not where, as here, the choice of forms seems haphazard and accidental. Considerations like these have impelled courts to shy away, generally, from designating the withholding or diverting by the defendant of funds in the treasury as an eminent domain taking.", at p. 456. Defendant argues here that its exempting of homesteaders from making cash payments and its failure to reimburse plaintiffs for loss of proceeds at most were breaches of contract or breaches of trust which, even if deplorable, do not constitute a 5th amendment taking. Defendant's breach of contract argument doubtless springs from our reasoning in *Confederated Salish*, wherein we noted, even though not argued by plaintiffs, that defendant's use of Indian monies for a project which it had earlier promised to finance itself was a breach of agreement, that plaintiffs' violated rights were contractual rights, and that the "taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment.", at p. 455. (Emphasis in original). This is applicable to a mere breach of a contract but perhaps not to its overt repudia-

tion. *Lynch* v. *United States*, 292 U.S. 571 (1934). But, as we have held, we need not find that latter situation here since whatever the exact legal nature of the parties' interests and obligations under the 1895 agreement, they are more than contractual. Thus defendant's breach of trust argument must also fail. Admittedly, under the agreement of 1895, defendant promised to hold *monies* in trust for plaintiffs; hence, as to this *res* it might well have been called a trustee. Still unclear and unresolved, however, is defendant's status as to the *lands* in question. In our earlier interpretations of the Act of 1880, whose land disposal provisions are sufficiently interchangeable with those of the act at bar, we never described defendant as being an actual trustee as to the lands. Specifically, we said that it was unnecessary to classify the Government as a trustee as to the 1880 lands in question, 100 Ct. Cl. at p. 432, and that it occupied a position "comparable to a trust", 112 Ct. Cl. at p. 130. If defendant is correct in reading *Confederated Salish* as standing for the proposition that breaches of trust are ineligible *per se* for treatment as 5th amendment takings, then we reply that defendant was *not* or not solely a trustee as to the lands in question. To say otherwise would necessitate overturning our previous decision that the enactment of the Adams Amendment was a taking. It is obvious, however, from *Navajo Tribe of Indians* v. *United States*, 176 Ct. Cl. 502, 364 F. 2d 320 (1966) that the United States is not exonerated from paying interest, as for an eminent domain taking, merely because the obligations of the United States with respect to the Indian lands involved in the claim were denominated as being, among other things, those of a trustee.

Since each taking occurred when the ownership of a homesteader became final, *Creek Nation* v. *United States*, 302 U.S. 620-22 (1938), we leave it to the parties to decide whether to assume the burdensome task of fixing the date of patent for each homesteader and compute the damages individually, or rather, as suggested by the Commission, to fix an average date or dates for the takings and compute the damages generally.

II.

Plaintiffs' second claim in this case is for an accounting of funds collected by the defendant in the course of selling plaintiffs' land under the 1895 agreement. In their petition filed with the Commission on August 10, 1951, plaintiffs timely alleged a claim for an accounting for moneys received by defendant for some 81,953.18 acres of land disposed of in various ways other than as free homesteads. Responding to this claim, defendant submitted a General Accounting Office (GAO) report accounting for proceeds derived from sale of certain lands pursuant to the Act of 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951. Plaintiffs, after studying this report, filed exceptions to its contents. These exceptions were filed on June 12, 1963. Amended exceptions were subsequently filed on September 30, 1963. The Commission, in its interlocutory order, declared that defendant should make a further and complete accounting in line with specified rulings on each of plaintiffs' exceptions.

Defendant contests this decision on procedural grounds but make no objection to the substance of any of the Commission's rulings on plaintiffs' exceptions. The procedural defenses are these: First, the accounting claim alleged in plaintiffs' originally filed petition was already rendered by prior adjudication. Second, the subsequent accounting claims amended in 1963 by way of exceptions were untimely filed additional claims. Hence the Commission under 25 U.S.C. 70(k) (1964) had no jurisdiction to rule on these claims. Third, the Commission's order for an up-to-date accounting was beyond its jurisdiction under 25 U.S.C. 70(a) (1964).

Regarding the first defense, we can dispose of it summarily. Since we have held that the 1950 settlement case No. 46640 was limited to settling accounts for the 1880 cession exclusively, we are compelled to find that plaintiffs' original accounting claim which derives from the agreement of 1895, was not included and is therefore still cognizable.

The second defense, however, does not admit to such easy disposition. Plaintiffs, perhaps content to rest on the

Commission's reasoning, made no response to it in their brief. The Commission excused plaintiffs' late pleadings even though it recognized that the exceptions raised general accounting claims not referred to in plaintiffs' original petition. Despite the difficulties stemming from the language of its enabling legislation—25 U.S.C. 70(k)—it reasoned that since plaintiffs could not have discovered any of their trustee's indiscretions until receiving the GAO report, this matter should be treated under the general legal principle that "limitations [do not] * * * begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.", 17 Ind. Cl. Comm. at p. 54. This result was deemed particularly equitable in the light of defendant's "unique position" of not having to render periodic accountings to its "Indian wards". "It [the Government] should not," said the Commission, "be allowed to take advantage of that fact for its own protection". *Id.*

Although we agree with the Commission's resolution of this issue, we do not feel compelled to comment on its novel rationale. Rather it is our belief that plaintiffs' exceptions were merely amendments to their timely filed petition. *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 328, 393 F. 2d 786, 790 (1968); *The Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 585, 372 F. 2d 951, 959 (1967), and as such under the Commission's rule of procedure 13(c) they relate back to the time of original filing, thus curing the jurisdictional time bar defect. That the Commission itself did not similarly construe these exceptions is understandable, since its 1966 decision in this case was rendered without the guidance of the above mentioned cases. In *Snoqualmie* we allowed the late amendment because by the Snoqualmie's original petition the Government "was put on notice of the *possibility* that the Snoqualmie organization *might* expand the scope of its claim.", *Snoqualmie* at p. 589. (Emphasis supplied.) The same is true of the instant case. Admittedly plaintiffs' original petition requested an accounting for certain specified items. Responding to this petition, defendant submitted the GAO report but

not without expressly restricing its introduction to the issues of liability raised in the petition. This precautionary measure, which the Commission found correctly to be specious, indicated, in our opinion, that defendant knew from the outset that to adequately respond to plaintiffs' petition it would have to submit the GAO report which contained various ignoble confessions. That it declined to contest before the Commission the substance of plaintiffs' exceptions underscores its concession to the obviousness of its fiduciary misconduct disclosed in the report. We therefore find that the substance of plaintiffs' original petition put defendant on notice that it might have to defend against a broader claim. This finding was stated implicitly by the Commission, 17 Ind. Cl. Comm. at p. 55:

> We are of the opinion that the allegation for a specific accounting which brought forth the [GAO] accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a *sufficient basis* for requiring a further and complete accounting from defendant with regard to those items questioned by petitioner in its exceptions. (Emphasis supplied.)

Thus, following *Snoqualmie* and *Northern Paiute*, we hold that plaintiffs' exceptions relate back to the date of the original petition.

Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70(a) (1964) on its face bars the Commission from considering *any* claims accruing after August 13, 1946. In a previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accruing before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. *Gila River Pima-Maricopa Indians, et al.* v. *United States*, 135 Ct. Cl. 180, 186 (1956), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle that "a court once having obtained jurisdiction of the persons and subject matter of

a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar.

In view of the foregoing, we affirm as to the taking claim and all of the Commission's determinations related thereto, except for the finding that defendant is liable for just compensation for taking exactly 230,547.44 acres of land, the Commission having offered no explanation as to how it reached this figure. In remanding to the Commission the task of approving the amount of compensation due, we therefore do not restrict plaintiffs' recovery or fix defendant's liability at the 230,547.44 figure. We also affirm the Commission's decision as to the accounting claim. Accordingly, we return the case to it with the task of conducting the accounting consistent with rulings which were the subject of this appeal.

Affirmed and remanded.

SKELTON, *Judge*, dissenting:

I respectfully dissent. I cannot agree with the reasoning of the majority nor with the result they reach. In my opinion, the Indians in this case, along with other Southern Ute tribes, were paid $31,938,473.43 in 1950 for the identical land involved here, together with other lands. This was the largest judgment ever awarded by this court since it was established in 1855. The attorneys who represented the Indians in the recovery of this tremendous judgment received an attorney fee of $2,800,000. See *Confederated Band of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). As will be seen in the following pages, the same Indians and the same attorneys are before the court again in this case asking that they be paid again (twice) for the same land, and the opinion of the majority is going to allow them to get this double pay-

ment. This results, in my opinion, in a shocking give-away of millions of dollars of public money of the United States, and I cannot agree to it.

The overriding error in the opinion of the majority is the failure to honor the doctrine of *res judicata*. The crucial issue is whether the lands now at bar were included in the judgment of this court in *Confederated Bands of Ute Indians* v. *United States*, (Nos. 45585, 46640, 47564, 47566), 117 Ct. Cl. 433 (1950), in which, as stated above, the plaintiff and other Ute Indians were awarded over 31 million dollars in settlement of all of their claims, including those involving the lands in this case.

The judgment in No. 46640 (of over six million dollars) was entered pursuant to a stipulation signed by the attorneys for both parties to the law suit including the attorneys for the plaintiff in the present suit. Using language as clear and unambiguous as is possible in the English language, the plaintiff Confederated Bands (which included the present Southern Ute Band, appellee in the suit before us) entered into a complete release, extinguishment and settlement of any and all of their claims regarding the land then at bar. The parties agreed that:

> * * * [J]udgment * * * shall be entered in this cause as *full settlement and payment* for the *complete extinguishment* of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash between July 1, 1910, and June 28, 1938, (b) disposed of as free homesteads from December 19, 1885, to June 28, 1938, and (c) set aside for public purposes during the period from June 30, 1910, to June 27, 1938. The plaintiffs concede that due and proper accounting has been made by the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938. * * * [Emphasis supplied.] [*Id.* at 436-37.]

The stipulation then went on to describe a "Schedule 1," which contained the legal descriptions of approximately 1,523,236.95 acres of land embraced by the stipulation, saying: "So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside." [*Id.* at 437.] This Schedule 1 contains 338 pages of single-spaced, typewritten legal descriptions of land. A land expert would find it difficult, if not impossible, to make sense of this Schedule 1. Even if he were to analyze it, months of his time would be required in the process. When confronted with the schedule of lands pursuant to settling case No. 46640, the government only ran a spot check of the schedule, and concluded that while there were errors, it was impractical to continue the examination. Evidencing an obvious lack of reliance on the correctness and completeness of Schedule 1, the stipulation signed by both parties went on to state:

> * * * However, the judgment to be entered in this case is *res judicata, not only* as to the land described in Schedule 1, *but, whether included therein or not, also* as to *any land* formerly owned or claimed by the plaintiffs in western Colorado, *ceded to defendant by the Act of June 15, 1880* (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes. * * * [Emphasis supplied.] [*Id.* at 437.]

One searches in vain for a more clear, a more precise, a more final disposal and release of claims, than the one just quoted.

As stated earlier, the key issue now is whether the lands presently at bar, lands from Royce Area 617 in southwestern Colorado, were included in this all-inclusive 1950 settlement. To determine this, one must analyze the history of the lands at bar, to determine whether these lands are part of the "land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 * * *."

The majority has explained the history of this land prior to 1880. To avoid being repetitious, I will start my analysis at 1880. The agreement of 1880 which resulted in the Act of 1880 was inspired by the so-called Meeker Massacre of 1879, in which an Indian agent and others were killed by certain Utes. The government sought to pacify the nomadic Utes by domesticating them, to the extent that each Indian would be given an allotment of agricultural land, upon which he would be converted from a nomad to a farmer. The vast majority of the 1869 Ute Reservation was not suitable for agricultural purposes; therefore, other lands had to be found. So under the Act of 1880, the Uncompahgre Utes were to move to agricultural lands on the Grand River in Colorado and Utah, and there receive their allotments. The White River Utes were to move to agricultural lands on the Uintah Reservation in Utah, and there receive their allotments. There was some suitable agricultural land in southwestern Colorado along the LaPlata River, and it was to this area that the Southern Utes were to move and receive their allotments. Section 3 of the 1880 Act authorized the Secretary of the Interior to survey the lands in the vicinities mentioned, and then the Commissioners were to cause allotments to be made to each and every Indian. Then the Act states, in clear, precise, and totally unambiguous language:

> * * * [*A*]*nd all the lands not so allotted*, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed* to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, * * *. [Act of June 15, 1880 (21 Stat. 199).]

Clearly (it could not be stated more clearly), the surplus of the lands after allotments were made was conveyed to the government by the 1880 Act. Therefore, the words in the 1950 case No. 46640, "ceded by plaintiffs to defendant in 1880," words which are descriptive of the lands involved in the 1950 settlement, include the lands

presently before the court, and the doctrine of *res judicata* bars any further recovery.

Another look at the purpose of the 1880 Act reaffirms this conclusion. No new reservations were created by this Act. Rather, each tribe was merely moved to a certain area of land, out of which the tribe members were to receive individual allotments. No Uncompahgre Reservation was set up in Colorado and Utah, no White River Reservation was established in Utah, and no Southern Ute Reservation was established in southern Colorado.

How do appellees, the Southern Utes, try to get around this clear language? This is a difficult question for them to answer, and several different theories have been pressed upon the court at various stages of these proceedings. In its brief, the appellees say that the converse of the plain terms of the 1880 Act is true, namely, that the land now at bar was set apart and ceded to the Indians by the 1880 Act. This is patently insupportable by the clear terms of the 1880 Act.

Th second theory was advanced when this case was first up for oral argument in 1967, and counsel for appellees made a straightforward and honest acknowledgement in open court that the lands at bar were indeed ceded to the government in 1880, but were in effect receded to the Indians by the Act of 1895. In light of this acknowledgement, the court entered an order of remand for the taking of additional evidence as to the intention of the parties to the 1950 stipulation. Apparently realizing the devastating damage that this acknowledgement did to their case, and that they could not prevail under it, appellees' counsel later said that the court "misconstrued" the acknowledgement, and sought to explain it away in its Motion to Vacate Order of Remand. The court did not misconstrue the statement. I was present and heard counsel make it. To clear the record, an examination of the 1895 Act to bring to light its true effect and purpose is in order. Unlike the Uncompahgre and White River Utes, who soon went to the land set aside for them and took allotments, the Southern Utes resisted allotments. Apparently, the life of the farmer did not appeal to them, so they continued living in a nomadic

state within the bounds of the land set aside for their allotments. In 1888 they attempted to negotiate a settlement to move to Utah, but this was not ratified. So here the Southern Utes were, living within a land area, but refusing to take allotments as directed by the Act of 1880. To verify this, we have only to look at appellees' own evidence in this case. Exhibit No. 5 before the Indian Claims Commission contained a copy of a report dated April 28, 1894, from the Commissioner of Indian Affairs to the Congress. Speaking of the Southern Utes' presence on the land set aside for allotments by the Act of 1880, the Commissioner said, "Here they have remained ever since, being in the anomalous condition of having ceded their reservation and yet remaining upon it." The Commissioner in 1894 clearly understood the stalling tactics of the Southern Utes, and saw the necessity for bringing an end to this "anomalous condition." And indeed, it was to end this condition that the Act of 1895 was passed. This Act did not change the 1880 Act; the declared purpose of the 1895 Act was that "* * * [*T*]*he treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.*" [Act of February 20, 1895 (28 Stat. 677).] [Emphasis supplied.] A reading of the Act of 1895 makes it manifestly apparent that no cession, no reservation was encompassed. Rather, the Indians who would take allotments were given them, and those who refused were moved to a reservation in New Mexico and western Colorado. (This is the present site of the Ute Mountain Reservation—this land is not in issue in the case now before the court.) The remainder of the land in Royce Area 617 after allotments were assigned (this is the land at bar) was opened for settlement under the homestead laws for the first time. (It should be noted that the sale of the land under the homestead laws was a violation of the Act of 1880. That is why, I believe, the 1950 settlement with the Indians included land "* * * disposed of as free homesteads from December 19, 1885, to June 28, 1938, * * *." [*Id.* at 437.]) So any argu-

ment that the land was receded to the Indians in 1895 cannot be sustained.

This leads directly to the third theory advanced by appellees regarding its retention or acquisition of the lands presently before the court. This theory, set forth in the Motion to Vacate Order of Remand and in the most current oral argument before the court, states in effect that the lands were "set-aside" in 1880, and officially recognized as Southern Ute lands in the Act of 1882. This argument, just as the prior arguments, misses the mark. The first half of this argument is true. The lands were indeed set-aside in 1880, but as we have shown, only for the purpose of taking allotments. The remainder after allotments was released and conveyed to the United States, and therefore clearly within the 1950 settlement with the Indians (Case No. 46640). The second part of the argument is a misinterpretation of the clear terms and purpose of the Act of July 28, 1882 (22 Stat. 178). By the time of this Act, the Uncompahgre and White River Utes had moved from the former Colorado Reservation to the areas set aside by the Act of 1880 for their allotments. Therefore, this vacated land area was now ready for settlement, and the Act of 1882 was passed to open this area for disposal under the terms of the Act of 1880. But the Southern Utes were still (and for thirteen more years continued) stalling, so the remainder after allotments of their set-aside land area was not ready for settlement. The government wished to keep this set-aside area intact for allotment purposes until allotments were made, so paragraph two was inserted in the Act of 1882, to provide for the surveying of a line between the lands opened, and the lands set aside for allotments. Keeping this area temporarily intact for allotments was the sole purpose and sole legal effect (before the majority opinion of this court in this case) of the Act of 1882. There is again a complete absence of any words of cession or reservation. Therefore, this theory advanced by appellees is without merit.

In fact, no theory has been advanced by the Southern Ute Indians which would enable us to uphold the opinion

of the Indian Claims Commission. Rather, the government has successfully shown that the Commission's opinion must be reversed. The 1950 settlement (117 Ct. Cl. 433, 436) is applicable, because the lands at bar were included in that case. The appellees are absolutely bound and barred by the 1950 case; the doctrine of *res judicata* cuts them off. Any other conclusion would be a violation of the Supreme Court's holding in *United States* v. *Wm. Cramp & Sons Co.*, 206 U.S. 118, 128 (1907), where the Court said:

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. * * * [*Id.* at 128.]

The language of the 1950 stipulation is even clearer, more all inclusive, and more final than that quoted by the Supreme Court. It says that the judgment entered in that case is *res judicata*, "not only as to the land described in Schedule 1, but, * * * also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and * * * disposed of as free homesteads * * *." To tie up all the loose ends, this court in 1950 went even farther, and said "* * * The petition of plaintiffs herein shall be deemed amended to conform to this stipulation." [*Id.* at 437.] The comprehensive terms of the stipulation for judgment in case No. 46640 show an intent to clean up and close up every claim arising out of the government's dealings with the Ute Indians and their former Colorado Reservation land. There is no manifestation of an intent to reserve any claim. Appellees' present claim falls squarely within the four corners of the 1950 settlement, and has therefore already been settled, paid, and extinguished.

And, the tribe is further bound because of the concession it made in this 1950 stipulation. The stipulation,

accepted by this court and the parties to the suit, read "The plaintiffs concede that due and proper accounting has been made by the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938." At the time this concession was made, the GAO Report for case No. 46640 had been mailed to the attorneys for the Southern Utes. This report (Def's Ex. No. 21) included sales from the Southern Ute portion of the 1880 cession under the act of 1895. The Tribe conceded that this accounting was due and proper. (Sales from the Southern Ute portion of the 1880 Cession up to 1910 were accounted for in case No. 30360 (45 Ct. Cl. 440 (1910)).

The Indian Claims Commission dismissed this crucial factor, saying that the amounts included were merely errors on the part of all concerned. These "errors" amounted to $215,989.95 paid under section 3 of the Act of 1880, and $215,977.58 paid under section 5 of the Act of 1895. The true error here was made by the Commission in not recognizing the true nature of this former compromise and settlement of appellees' claims.

One additional point should be raised regarding the effect of case No. 46640. This court ordered the case remanded to the Indian Claims Commission in 1967 with instructions to hear additional evidence on the intention of the parties signing the stipulation. The only testimony taken at the rehearing was that of Dr. Ernest L. Wilkinson, signatory to the stipulation in case No. 46640, and of Georgette Betor Lee Hall, who took part in preparing Schedule 1. The government took the position that the stipulation spoke for itself, and that the parties' intentions should be determined from the four corners of the instrument. Further, the government produced no documents, contending that all such requested material was the work product of the attorneys for the Department of Justice, and, therefore, privileged information protected by order of the Attorney General. Not surprisingly, Dr. Wilkinson, attorney for the appellees, testified that it was not his intention to include any of the lands presently at bar in the 1950 stipulation. It is appropriate to point out that if he had said anything else, he would have made

himself ridiculous in that any other statement would have contradicted appellees' brief and his own law firm's position in this case. No weight can be given to these additional findings of fact. And a case of this magnitude cannot be decided because of a disagreement by the court with the government's policy of nondisclosure of work products. The Commission concluded that:

> * * * [I]t was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the government * * *. [21 Ind. Cl. Comm. 268, 275 (1959).]

This additional evidence is therefore factually insufficient; it is also legally insufficient. This is due to the well-settled doctrine that parol evidence cannot be admitted in collateral proceedings to vary or explain judgments or judicial records. A stipulation such as was entered in No. 46640 is an act of the court and has the same force and effect as all judgments. *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261 (1885); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Mason* v. *United States*, 144 Ct. Cl. 579, 169 F. Supp. 507 (1959).

The reason for and importance of this doctrine was set out by this court in an earlier case, *Utah Power & Light Co.* v. *United States*, 70 Ct. Cl. 391 (1930):

> * * * If, by reason of the decree having been entered by consent, the judgment which forms part of it is not in fact an adjudication of the issues in the case in accordance with its recitals, then in all the numerous cases in which final decrees have been entered by Federal courts [on stipulation] in accordance with the agreement between counsel for the Government and counsel for the other party to the action, the decree is not binding upon the parties and becomes of no force and effect. The establishment of such a doctrine, * * *, would not only surprise the legal profession generally, but render a final

settlement of cases pending in courts practically impossible. [*Id.* at 397-98.]

The case should never have been remanded to the Commission for this purpose and I regret that I did not dissent from the decision to do so. This remand was an open invitation for a collateral attack on our 1950 judgment, which is not permissible and made it appear that our court did not know what it was doing when it entered the 1950 judgment settling, compromising, and paying all of appellees' claims of every kind and character regarding all of its lands ceded to the United States in 1880, which included the land in suit.

But, says the majority, the Indians[1] should still recover, on the theory, itself quite anomalous, that the Act of 1880 was somewhat ambiguous, and, therefore, the subsequent governmental acts and Acts of Congress can be looked to to determine ownership of the lands in question. This argument is not only a contradiction of the facts and circumstances of this case, but also violates the principle of *stare decisis*.

Primarily, the Act of 1880 is not ambiguous. Its terms clearly indicate that the title to all lands embraced by the Act, and not allotted to the individual Indians, is released and conveyed to the United States. The surplus land involved in this case, land remaining after allotments to individual Southern Utes were made, was, therefore, not the property of the Indians, but of the United States. As we have stated earlier, the language in case No. 46640, "* * * any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 * * *," is *descriptive* language. The court in 1950 had no other convenient method of describing the land, so reference was made to it in the best terms available, namely, as all land included in the Act of 1880. Since the lands at bar were not allotted to

[1] A judgment in this case will doubtless reach into the millions, as did the judgments in 1950. The current population of the Southern Ute Tribe is around 660. (Dept. of Interior, Bureau of Ind. Aff.; "Estimate of the Indian Population Served by the Bureau of Indian Affairs; 1968".)

individual Indians in accordance with the 1880 Act, title to them was therefore released and conveyed to the United States. Therefore, the lands at bar fell squarely within the stipulation in case No. 46640.

This being the case, the subsequent acts of the government are without legal effect as far as the facts of this case go. Two reasons make this conclusion mandatory. First, assuming for the sake of argument that governmental acts subsequent to 1880 were confusing, *still* the lands in question were conveyed to the United States by the Act of 1880. Second, a correct reading of the Acts of 1882 and 1895 show that these Acts made absolutely no change in the Act of 1880. I have already explained these Acts, and will not repeat myself. Suffice it to say that there are no words of cession or reservation in these later Acts (as regards the land at bar), and, therefore, title remained in the government in accordance with the Act of 1880, and did not go to the Southern Utes. The Indians' supposititious belief that they owned the land is of no legal importance, and it is surprising that the majority would believe Ute Indian Buckskin Charlie instead of the Congress of the United States. This is not a contract case where detrimental reliance comes to play; nor, for that matter, have the Indians suffered to their detriment by mistakenly believing they were the owners of the land they ceded away. And, any subsequent confusion on the behalf of changing government officials does not and cannot change the binding legal effect of the Act of 1880. Rather, it only goes to show that the Indians' stalling tactics were partially effective, and that time dulls the inattentive senses of changing governmental officials as well as of Indians.

The majority places weight on the fact that the Act of 1895 was negotiated solely with the Southern Utes. Fifteen years had then elapsed since the 1880 agreement, and the government desperately needed to get this matter settled. Therefore, it used what means it deemed expedient to convince the Southern Utes to take allotments, or move to the site of the present Ute Mountain Reservation. This meant negotiating directly with the Southern Utes, and paying the proceeds of the land held in trust

directly to them. This was a mere gratuitous windfall to the Southern Utes, and any harm done here was to other tribes of the Confederated Bands of Utes. Furthermore, even if we accept for the sake of argument the majority's position, nothing done in 1895 took the lands presently in question out of the *descriptive phrase "lands ceded in 1880."* Even if the majority's position regarding the Act of 1895 is true, the lands at bar were still within the terms of the stipulation, since they were originally part of the lands ceded in 1880, and, therefore, any claims pertaining to these lands have been disposed of and settled.

To document the fact that the lands presently before us were indeed ceded by the Indians to the government in 1880, we need only pay heed to the doctrine of *stare decisis*, and examine earlier cases decided by this court which dealt with and interpreted the Act of 1880. Each of these cases involved the Act of 1880, and what lands were embraced therein, and in each case the question of what lands were involved in the Act of 1880 was clearly before the court for decision.

The first case to arise out of the Act of 1880 is *The Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910). This was an accounting case for the proceeds of all cash sales of land ceded by the Indians to the United States under the Act of 1880, up to 1910. The printed record of the case (Def's Ex. 14a and 14b) establishes beyond a doubt that lands from Royce Area 617 (the lands presently before the court) and Royce Area 616 were included in the final judgment of this case, since these lands were within the 1880 cession to the government. In the Memorandum in re the *Confederated Bands of Indians* v. *United States*, Cause No. 30360, at page 634 (Def's Ex. 14a), the following excerpt is right to the point:

> The area of lands sold during the fiscal year 1908, as first stated, was 112,158.94 acres, while the cash received therefor is $90,219.93. (Record p. 355.) The explanation is that part of this land has been sold under the Act approved February 20, 1895 (28

> Stats., 677), [i.e., opened under the homestead laws] being surplus lands on the Southern Ute Reservation, partly on deferred payments. *These lands are embraced within the cession of 1880 and within the accounting under the jurisdictional act.* [Emphasis supplied.]

In the opinion of the court in the case, Judge Barney wrote:

> In compliance with the provisions of the act [of 1880] all of the plaintiffs were removed to Utah, and allotments were there made to them, except the southern Utes who remained upon the reservation [of 1868] and received allotments along and within its southern border and partly within New Mexico. * * *. [*Id.* at 461.]

The Judge also wrote:

> By that agreement [of 1880] the plaintiffs ceded to the United States *the entire remainder of their reservation* * * * and agreed to remove, settle upon, and accept individual allotments of unoccupied agricultural and grazing lands in *certain designated localities* * * *.
>
> It was further agreed by section 3 of said act that *all lands within the ceded limits not allotted in severalty* to the plaintiffs should be *deemed to be public lands of the United States* * * *. [Emphasis supplied.] [Id. at 459-60.]

Also included in this 1910 case was an accounting for land taken for the San Juan National Forest. This land was within Royce Area 617, the land area presently before the court, and was held by the court in 1910 to be land embraced by the cession of 1880.

Appellees have failed to distinguish this case, or to show that an error was made by the court in 1910. The majority's opinion likewise fails to follow this case, or to deal with it.

The next case involving the Act of 1880 to come up was *Confederated Band of Ute Indians* v. *United States*,

100 Ct. Cl. 413 (1943), which dealt with the remaining undisposed of lands in Royce Area 616; therefore, the Act of 1880 was again before the court. This case arose after the 1938 "restorations." (By way of explanation, in 1938 by Act of Congress, the remaining undisposed of lands in Royce Area 616 were declared to be the property of the United States, while the remaining lands in Royce Area 617 were restored to tribal ownership.)

In the Reporter's Statement of the Case, we find the following:

> By the agreement ratified, confirmed, and amended in the Act of June 15, 1880, which was in turn accepted and ratified by plaintiffs, plaintiffs *ceded to defendant all territory* in Colorado then reserved for their use, *after the allotment* of certain lands to individual members of plaintiff bands as provided by said agreement. * * * [*Id.* at 416.] [Emphasis supplied.]

This is a correct interpretation of the Act of 1880.

The Reporter also set out the terms of the restoration of Royce Area 617:

> * * *[T]he Secretary of the Interior purported to restore certain lands in the southern portion of the area ceded in the Agreement of 1880 to the "Ute Mountain Band of Ute Indians of the Southern Ute Indian Reservation in Colorado," and to the "Confederated Bands of the Ute Tribe of Indians, Colorado," respectively. [*Id.* at 419.]

The fact that the land was *restored* to Southern Utes and other tribes of the Confederated Bands is convincing evidence that the Southern Utes did not retain ownership of these lands, because you cannot restore land if it was never ceded away.

Judge Madden, writing for the majority, construed the Act of 1880:

> On March 6, 1880, an agreement was made by the chiefs and headmen of the Utes, which was later ratified by the members of the tribes, *to cede their*

> *remaining lands in Colorado to the United States*, after first providing for certain individual allotments to some members of the tribes. * * * [Emphasis supplied.] [*Id.* at 421.]

Here is another clear holding by this court that the lands presently in question were a part of the lands ceded by the Indians to the government in 1880.

In 1948, the court heard a suit to determine which lands were taken and the value thereof within the terms of the 1943 judgment. *Confederated Bands of Ute Indians* v. *United States*, 112 Ct. Cl. 123 (1948). The court accepted the 1943 construction of the Act of 1880. The Indians have failed to distinguish this case.

The next litigation involving the Act of 1880 is the 1950 case, *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950), in which four causes (Nos. 45585, 46640, 47564, 47566) were settled. It is of course my contention that cause No. 46640 settled the claims on which the Indians are presently suing.

Soon after the 1950 case, the court heard a suit for attorneys' fees for services rendered to the Confederated Bands which resulted in the 1950 decision. *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). The very law firm which is now in court representing the Southern Utes in this case was bringing suit to determine the value of its services. Findings of Fact No. 25(b) from that case is another answer to the case before us, and, I would suggest, an answer to which plaintiffs now before us are specially bound. The court found:

> 25. (a) * * *
>
> (b) The original Ute reservation, established by treaty between the Indians and the United States in 1868, embraced 15,000,000 acres on the western slope of Colorado. In 1873 the Indians ceded to the United States a segment in the southern part of the reservation containing 3,000,000 acres. *In 1880 the Indians ceded to the United States the remainder of the reservation, containing 12,000,000 acres.* [Emphasis supplied.] [*Id.* at 623.]

In every single case which has come before this court involving the Act of 1880, this court has found that the Act ceded to the United States *all* of the lands in the former Ute Reservation in Colorado, excepting only the land transferred to individual Indians as allotments. The majority ignores these cases as if they were not in the books. In its zeal to compensate the living Indians for the claimed harm done their ancestors, the majority loses sight of the fact that the Indians have already been amply reimbursed for the land at bar in 1950. The Southern Utes may have sincerely believed that this land was theirs, but Indians too can be wrong. In another case in which the Utes were plaintiffs (involving different land), the Supreme Court set out the long established rule governing the interpretation of treaties, acts, and agreements between the Indians and the United States:

> * * * While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised. [*Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 179-80 (1947), *aff'g*, 106 Ct. Cl. 33, 64 F. Supp. 569 (1946).]

I am satisfied that in the case before us the government has performed all it promised and has already paid the Indians for their present claim.

It should be pointed out that when the four cases (Nos. 45585, 46640, 47564 and 47566) were settled in *Confederated Band of Ute Indians* v. *United States*, 117 Ct. Cl.

433 in 1950, the settlement was one of pure compromise of all the claims of the Ute Indians. The agreement of settlement was not reached quickly. In fact, negotiations for compromise and settlement extended over a period of three years. The government first offered the sum of $14,000,000, plus interest, less offsets, in full settlement. This was refused by the Utes. The government then offered $20,000,000, including interest, less offsets, which was refused.

The Utes' attorneys demanded $30,000,000 in settlement of all the claims and cases. Finally, the parties agreed to a compromise settlement of $20,000,000, plus interest, amounting in all to the sum of $31,938,473.43. This amounted to $15,600 for each Indian. The parties then entered into a joint stipulation and judgment of compromise and settlement of all claims and demands, right, title, interest, and estate of whatsoever nature in and to the land in western Colorado ceded by the Ute Indians to the United States by the Act of June 15, 1880. All of these negotiations are shown in the opinion of this court in the case of *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951) in which the attorneys were asking this court to allow them an attorney fee of $3,193,847.35.[2] They alleged in great detail all the work they had done, which was considerable, how they had negotiated for the compromise and settlement and how long it took to reach a settlement agreement. The significance of all of this is to show that the settlement was a lump sum compromise in the nature of a jury verdict for *all* the claims of the Ute Indians with reference to the land ceded in 1880 (including the land involved here). It did not matter what land was listed in Schedule 1, nor whether or not all of it was listed, nor whether the listing was correct. The Indians make a great deal to do over their claim in this case that no land in Royce 617 was listed in the Schedule. This is immaterial, because the stipulation of the parties and judgment stated it was in *full* settlement and payment for the *complete extinguishment* of plaintiffs' claims of *whatso-*

[2] The sum of $2,800,000 was allowed.

ever nature in and to the lands ceded in 1880, *whether listed in Schedule 1 or not*, and plaintiffs' petition was deemed amended to conform to the stipulation.

The Indians and their attorneys are estopped to attack or impeach their own stipulation and judgment which they signed and accepted and for which they have been paid. *Davis* v. *Wakelee*, 156 U.S. 680, 689-90 (1895); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F. 2d 378, 382 (5th Cir. 1953), *cert. denied*, 346 U.S. 855; *American Nat'l Bank & Trust Co.* v. *Taussig*, 255 F. 2d 765, 769 (7th Cir. 1958), *cert. denied*, 358 U.S. 883. This settlement was payment for, and an accord and satisfaction and release of, all of their claims, including those before us in the instant suit. I mention the attorneys because this court must fix their attorney fees, as it did in the previous case, as an amount not exceeding 10 percent of the recovery. They shared in the previous recovery on a contingent fee basis and will share in this one on the same basis. I consider that under the circumstances they are bound by the stipulation, settlement, and judgment in 1950 to the same extent that the Indians are bound.

Lack of Necessary Parties Plaintiff

There is another fatal flaw in the Indians' side of the case before us, a flaw which requires a reversal of the decision in this case. This is because there is a lack of necessary parties before the court.

First, it should be observed that any claim that the White River, Uncompahgre or Uintah Utes might have had was lost in the following Resolution of June 1, 1950. (Def's Ex. 18. This resolution was accepted by Congress and carried into effect by section 2 of the Act of August 31, 1951, 65 Stat. 194.)

> (3) * * * [T]hat the Southern Ute Band (including the Ute Mountain Utes) shall foreover possess and own their Reservation [this included the Ute Reservation established west of Range 13 by the Act of 1895 and the residue lands (unallotted, unsold and not taken for the San Juan National Forest) east of

> range 14 which were restored to tribal ownership by order of the Secretary of the Interior of September 14, 1938] free from any claim of the Ute Indian Tribe of the Uintah and Ouray Reservation * * *.
>
> (4) * * * [T]hat neither the Southern Utes (including the Ute Mountain Utes) nor the Uncompahgre, White River or Uintah Utes shall have any claim against each other for the past distribution of funds or allocations of land; * * *.

The fatal lack of parties, however, involves the various original signatories to the Agreement of 1895. The Southern Utes before the court cannot recover, because the present day Ute Mountain Utes, who are a part of the Southern Ute Tribe, are not parties to the suit.

At the time of the passage of the Act of 1895, there were three bands known collectively as the Southern Utes; the Muaches (or Moaches), the Capotes and the Weeminuches. As I have said above, by the Act of 1895, one group of Indians chose to move to a reservation in western Colorado and New Mexico, and the other Indians chose to take individual allotments in the eastern portion of Royce Area 617. The group refusing allotments, which moved to the new western reservation, was composed mainly of Weeminuches (see appellees' brief at 13-14), and became known as the Ute Mountain Tribe, and were officially so recognized in 1940. The individual Indians who took allotments in the east were mainly Capotes and Muaches and are the appellees now before the court.

The Act of 1880 moved the Capotes, the Muaches and the Weeminuches (under the collective name of the Southern Utes) to the land area now in question for the purpose of taking allotments. Then, in 1895, some moved to the site of the present Ute Mountain Reservation in the west and some took allotments in the east. (It should be noted that the appellee Southern Ute Tribe had no official reservation until 1938, when the residue of unsold and unallotted lands in Royce Area 617 was restored to tribal ownership by order of the Secretary of the Interior. Prior to 1938, the only possessory interest any of these Southern Utes held in any land was their individual interest in their individual allotments.)

Under section 5 of the Act of 1895, all of the bands of the Southern Utes, including the present day Ute Mountain tribe and the appellees, shared in the special benefits from the lands to be sold after the allotments. (See 28 Stat. 677, 678.) The Act even specifically set aside, out of the first moneys realized, an amount to be paid to "Buckskin Charlie, as chief of the Moaches, and *Mariano, as chief of the Weeminuches*, [who was of the Ute Mountain tribe] * * * [and] to Tapucke and Tabewatch, as chiefs of the Capotes * * *."

It is perfectly clear that the only property granted appellees' ancestors were the allotments, and the only property granted the ancestors of the present Ute Mountain Tribe was the land which is now the Ute Mountain Reservation. And the right to the proceeds from the remaining lands sold (the basis of this case) was granted to *all* of the Southern Utes (ancestors of the present Southern Ute Tribe and Ute Mountain Tribe) by the Act of 1895. Therefore, the Ute Mountain Tribe, not a party to this suit, has an interest in every claim arising from this land. Appellees' failure to join them results in a fatal lack of necessary parties.

In their brief, appellees attempt to deal with this serious problem within the space of three paragraphs (see brief at 13-14). To put it mildly, the reasoning and statements set forth are pure fantasy. Appellees say that the Act of 1895 was, "In effect, * * * a cross-relinquishment of rights between the allotted and unallotted Southern Utes * * *." This is simply wishful thinking, and is plainly contradicted by the specific terms of the Act of 1895, which gives the benefits and proceeds from the Act to *all* Southern Utes, both allotted and unallotted. There is neither in effect, nor in fact, nor in law any such "cross-relinquishment" of rights. The brief then says that "the unallotted Southern Utes surrendered their interest in the eastern portion of 'their present reservation' and the allotted Southern Utes surrendered their interest in the western portion." This again is simply fantasy. The Act of 1895 reserves the rights of *all* Southern Utes (Weeminuches, Capotes and Muaches, or, present day Ute Mountain Tribe and Southern Ute Tribe) to the proceeds of the sale of remaining lands.

Appellees then say, "The Southern Utes accepted this separation and two land-owning groups, each with its own reservation, were created. Through the voluntary cross-relinquishment of their interests under appropriate legislation, the allotted Southern Utes became the sole owners of the eastern part of the Southern Ute Reservation." (Brief at 14.) First, two land-owning groups, each with its own reservation, were *not* created. The only interest the allotted Indians held in the land was in each individual allotment. No reservation in the eastern part of Royce Area 617 was created; to the contrary, only individual allotments were created. Second, neither through a hypothetical "cross-relinquishment," nor through "appropriate legislation" (it is interesting to note that we are not cited to any of this "appropriate legislation"), did the present day Southern Utes become sole owners of the eastern part of Royce Area 617. To the exact contrary, the present day Southern Utes became owners only of individual allotments, and the remaining land was held by the government, with the proceeds to go to all of the Indians, Weeminuches, Capotes and Muaches, regardless of whether they lived on the new Ute Mountain Reservation, or on an allotment.

I do not agree with the hindsight approach of the majority to this problem by its reliance on and interpretation of Rule 62(a) of this court. This rule applies only to suits originally filed in this court. The case before us is not such a case, but is one that was filed originally with the Indian Claims Commission, which has its own rules, and we are hearing the case on appeal. Not only that, but this court has its own separate rules for Indian cases it hears on appeal, adopted in 1948, entitled "Rules of the Court of Claims of the United States Governing Appeals From the Indian Claims Commission." Consequently, Rule 62(a) does not apply. In any event, the interpretation of this rule by the majority renders it meaningless. They say, in effect, that the rule means that an outside third party who may not even know the suit is pending, must affirmatively and timely intervene (file a claim) and, if he does not do so, the rule is satis-

fied. This is not what the rule says. It states in unequivocal language:

> * * * [P]ersons having a joint interest adverse to the United States, *shall be made parties* and *shall be joined* on the same side as plaintiffs. When any person who should join as a plaintiff refuses to do so, he may be made an involuntary plaintiff. [Emphasis supplied.]

As may be seen, this rule provides that persons having an interest "shall" be made parties and "shall" be joined as plaintiffs. This is compulsory and not optional. Also, the rule, where it is applicable, contemplates that persons having an interest *at the time the suit is filed* shall be joined. This suit was filed August 10, 1951, at a time when the Ute Mountain Indians of the Southern Ute Tribe unquestionably had an interest in the claim. Under Rule 62(a), if it applies, they should have been made parties by the appellees at that time, and because of the failure to do so by appellees, there was and is a fatal lack of necessary parties in this case. But, the majority, with its hindsight approach is applying the rule as of now, 18 years after the suit was filed, saying, in effect, it would do no good to make them parties now because limitations has run on their claim, and, therefore, Rule 62(a) is satisfied and the present plaintiffs, notwithstanding their failure to comply with the rule, is in the position of "winner take all," including the interest of the Ute Mountain Indians. I cannot agree with this interpretation of the rule.

But, the problem does not end here. The Commission itself said that if the Utes ceded their entire Colorado Reservation in 1880, "then the present day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties."[3] Of course, as shown by the foregoing, this is exactly what happened. The Utes did cede all their remaining reservation to the United States in 1880. Therefore, the Ute Mountain Utes were necessary parties.

There is another reason not mentioned by the government why the Ute Mountain Utes are necessary parties

[3] 17 Ind. Cl. Comm. 28, 52.

to this suit. I refer to the fact that this suit was filed by the Southern Ute Tribe or Band of Indians. There is no question but what the Ute Mountain Utes, who live in the west, are as much a part of the Southern Ute Tribe or Band of Indians as the other Indians who live in the east (of Royce 617). I see nothing to prevent the Ute Mountain Utes from suing the United States, after payment of the judgment being awarded to the present appellees by the Commission and by the majority in this case, on the theory that since they are a part of the Southern Ute Tribe or Band of Indians, this suit was maintained for their benefit and the government has paid their part of the recovery to the wrong parties, namely, the Southern Utes who live in the eastern part of Royce 617. In that case, the government would have the obligation of paying the claims for this land not only twice, but *three* times. The situtaion finally gets ridiculous. This problem is not cured by the allegations and contentions of the present plaintiffs to the effect that they are the sole owners of the claim, because the Ute Mountain Indians of the Southern Ute Tribe have had no notice of this suit and could not be bound by allegations of the plaintiffs unknown to them. They could, with sound reason, dispute this claim of the present plaintiffs and would no doubt do so if they had notice of this suit and were parties to it.

As late as 1951, the Congress considered the Ute Mountain Utes to be a part of the Southern Ute Band as shown by the resolution carried into effect by section (3) of the Act of August 31, 1951, 65 Stat. 194, quoted above, which contained the provisions "(3) * * * [T]he Southern Ute Band *(including the Ute Mountain Utes)*" and again in section (4): "* * * [T]he Southern Utes *(including the Ute Mountain Utes)*." [Emphasis supplied.] There is no question but what the Ute Mountain Utes were as much a part of the Southern Ute Tribe as were the present appellee Indians, and they were necessary parties to this lawsuit. It is difficult to see how one could reach a different conclusion.

The appellees have completely failed to sustain their contention that they are the sole owners of the claims in

suit. Perhaps it is natural that they have failed in this respect, because it would have been impossible for them to prove otherwise, since in reality they are not the sole owners of the claims in suit.

The claim stated in the appellees' petition, filed August 10, 1951 (before the expiration of the Indian Claims Commission Act), sought an accounting for:

> c. Defendant's failure to account for the proceeds from approximately 81,953.18 acres * * * was in violation of the aforesaid statutes [of 1880 and 1895] * * * and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.
> d. Defendant's failure to account for the proceeds from the sale of approximately 81,953.18 acres constituted unfair and dishonorable conduct on the part of defendant, and caused damage to petitioner in an amount equal to that received by defendant * * *.

As this is no more than a claim for proceds from sales, this claim has already been settled by the stipulation case No. 46640 (117 Ct. Cl. 433, 436 (1950)).

The additional accounting claims, which deal principally with mismanagement of trust funds (see Def's brief at 81-86 for complete listing), were inserted in the case in 1963 by way of filing exceptions. This was long after the 1951 expiration date of the Indian Claims Commission Act (25 U.S.C. § 70k). When the tribe presented these additional claims, defendant objected strenuously that the claims were beyond the scope of the initial claim, and, therefore, their admission was violative of the Supreme Court's ruling in *United States* v. *Seminole Nation*, 299 U.S. 417 (1937), wherein the court said that after the time allowed in a jurisdictional act has run out, amendments may only supply details, but may not bring in additional claims. (This holding followed in *Seminole Nation* v. *United States*, 316 U.S. 286, 288-89 (1942).) The claims filed in this suit in 1963 are obviously beyond the scope of the original claim filed in 1951.

The Commission seems to concede that the new claims asserted went beyond the original claim, when it said:

> Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its petition for certain specific items and has now raised by means of the exceptions * * * certain general accounting claims not referred to in its petition. [17 Ind. Cl. Comm. 28 (1966).]

But the Commission attempts to get around this by applying a rule sounding in equity, that the tribe did not know how its funds had been mishandled within the time allowed, and that this knowledge came to light only after the appellees received the GAO report in the case. Even if this statement was factually correct, it could not extend the jurisdiction of the Commission, for the enabling Act reads:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. [25 U.S.C. § 70k (1964).]

But further, the evidence in this case shows that GAO reports covering the handling of the funds had been submitted to the Utes' counsel as early as June 1949 (report in case No. 46640), and February 1953. Although the latter GAO report, the report in this case, was submitted in 1953, it was not until 1963 that counsel for the Southern Utes filed these exceptions. Not only was the late filing barred by limitations due to the Indian Claims Commission Act quoted above, it was also barred by the equitable doctrine of laches.

Conclusion

In my opinion, in accordance with section 20 of the Act creating the Indian Claims Commission (25 U.S.C. § 70s(b) (1964)), I would hold that the findings of fact of the Indian Claims Commission in this case are not supported by substantial evidence, and especially its findings that the Confederated Bands of Ute Indians did not

cede their remaining lands in their Reservation to the United States in 1880; that the Ute Mountain Utes in the west of Royce 617 are separate from the Southern Ute Tribe in the east; that the lands involved in this case were not included in the settlement of 1950 and that the parties did not so intend; that a proper accounting has not been made by the government to the appellees. I would also hold that the conclusions of law stated by the Commission as a basis for its final determination are not valid and are not supported by its findings of fact for all of the reasons stated herein. This is particularly true with reference to its conclusions of law that the Ute Indians did not cede all their remaining lands to the United States by the Act of 1880; that the subsequent Acts of 1882, 1888, and 1895 restored and vested the lands involved here in the Southern Utes in the eastern part of Royce 617 and to the exclusion of the Ute Mountain Utes; that said lands were not included in the 1950 settlement and the appellee is now entitled to be paid for it; that *res judicata* does not apply and that the Ute Mountain Utes are not a part of the Southern Ute Tribe and consequently have no claim and are not necessary parties.

Both the majority and the Commission ignored and ruled contrary to the following well-established principles of law in allowing the plaintiff Indians to recover in this case:

1. *Res judicata.*
2. *Stare decisis.*
3. Compromise and settlement.
4. Payment.
5. Accord and satisfaction.
6. Release of all claims.
7. Collateral attack on the 1950 judgment.
8. Disregarding the 1950 judgment of this court when no direct attack has been made on it.
9. Estoppel of the Indians to impeach their own act in executing the stipulation, settlement, and judgment of 1950.

10. Varying the terms of the written stipulation and judgment of 1950 by the parol evidence of Attorney Wilkinson 19 years later as to his intention.
11. Lack of necessary parties plaintiff.
12. Limitations and lack of jurisdiction as to the accounting claim.
13. Lack of substantial evidence.
14. Erroneous conclusions of law.

Seldom do you find a case where so many bulwark principles of law have been ignored, by-passed, and violated. In my opinion, the decision should not stand.

I would reverse the decision of the Commission and enter judgment for the defendant.

COWEN, *Chief Judge*, dissenting:

Although I cannot join in a number of the observations made in his dissenting opinion, I am persuaded that Judge Skelton has accurately analyzed the purpose and effect of the Act of 1880 and subsequent acts involved in this appeal and has correctly concluded that appellee's right to recover is precluded by the judgments entered by this court in 1950 in the four cases (Nos. 45585, 46640, 47564, and 47566), *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950).

I also agree with Judge Skelton that this court erred in remanding the case to the Indian Claims Commission to determine the intention of the parties in executing the stipulation on which the judgment in Case No. 46640 was based. If such a collateral attack on the judgment entered in that case were permissible, I would readily concur with the court's holding that the proceedings before and the additional findings made by the Indian Claims Commission on remand, support the conclusion that the parties never intended that the stipulation included Royce Area 617. However, as clearly established by the authorities cited by Judge Skelton, the stipulation was the basis for the entry of a final judgment which may not be re-opened or examined in such a collateral

proceeding to ascertain the intent of the stipulating parties. Although our error—an error in which I participated—in remanding the case for that purpose is regrettable, it is not too late to acknowledge the error and to correct it.

I think it is much too late in the history of the Ute Indian litigation in this court to raise any doubt about the fact that the land, which is the subject of this appeal, was ceded to the United States by the Act of 1880. This court so found in each of its decisions discussed in Judge Skelton's opinion and the Supreme Court so construed the Act in *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169 (1947), wherein the Court stated:

> There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made. [330 U.S. at p. 177].

Moreover, the plaintiffs in the four suits (Nos. 45585, 46640, 47564, and 47566), filed pursuant to the Jurisdictional Act of June 28, 1938, 52 Stat. 1209, alleged that the land had been ceded to the United States. For example, paragraph 5 of plaintiff's petition in Case No. 46640 reads as follows:

> By agreement of March 6, 1880, which was amended, ratified and confirmed by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180 (amended by Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205), plaintiffs ceded to defendant a vast area of land in exchange for which defendant among other considerations agreed, after the allotment of certain lands to individual members of plaintiffs, to hold the balance of such lands in trust for cash entry (and not entry or settlement under the homestead laws), and to deposit the proceeds re-

ceived from such sales, after certain stipulated payments, in the Treasury of the United States for the benefit of plaintiffs. The Agreement of March 6, 1880, as amended by the aforesaid Act of June 15, 1880, was ratified and approved by three-fourths of the adult male Indians of the Confederated Bands of Utes within the time limit fixed by Section 10 of said Act.[1]

Furthermore, it is not open to question that the Jurisdictional Act of June 28, 1938, pursuant to which the four suits settled in 1950 were filed, was intended to confer jurisdiction on this court to hear, determine and render judgment on all remaining claims, legal and equitable, which the Indians then had against the United States, whether the claims arose under the Act of 1880 or subsequent acts. The first section of the Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent [sic] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the

[1] *See* Vol. 960, Printed records, Court of Claims Term 1949.

part of the United States with respect thereto, or otherwise.

I find nothing in the foregoing or elsewhere in the Act which suggests that the claim involved in this appeal was somehow reserved or excluded from the terms of the statute.

The Indian Claims Commission found that appellee is entitled to recover for the taking of 230,547.44 acres of land disposed of by defendant as free homesteads between 1899 and September 14, 1938, for interest due on the proceeds of the sales of appellee's land, and for an accounting as to the use of such proceeds.[2]

Plaintiff's petition in Case No. 45585 (the first of the four suits brought pursuant to the Act of June 28, 1938, and settled in 1950) was filed November 22, 1941, and plaintiff's petition in No. 46640 was filed October 15, 1945. Prior to the time these suits were filed in the Court of Claims, the causes of action, upon which the Commission predicated defendant's liability to the appellee, had accrued and could have been included in the four suits. Moreover, the allegations of plaintiff's petition in Case No. 46640 were broad enough to include the claims for which the Commission held the defendant liable. In the amended petition filed in that case on March 19, 1947, plaintiffs alleged the following in paragraphs 6 and 7.[3]

> 6. By decree of this Court in a suit brought by plaintiffs in 1909 (The Ute Indians v. The United States, No. 30360), pursuant to a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788, plaintiffs recovered judgment against defendant for the proceeds of certain sales and other disposals of the aforesaid lands up to June 30, 1910. No relief is sought with respect to such sales and dispositions in this action, but relief is sought with respect thereto in Case No. 47566, filed in this Court on December 30, 1946.

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[2] 17 Ind. Cl. Comm. 28, findings 10, 11, 19 and 20.

[3] Plaintiff's amended petition in No. 46640, *The Confederated Bands of Ute Indians* v. *United States*, Printed Records Court of Claims Term 1949.

By Executive Orders of December 6, 1916 and September 27, 1924, defendant withdrew and set aside 64,560 other acres of the aforesaid lands as naval oil reserves which lands are the subject matter of Case No. 47564, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

By Agreement of May 10, 1911, amended, ratified and confirmed by Act of June 30, 1913 (38 Stat. 77, 81-82), defendant conveyed 20,160 other acres of land subject to the aforesaid 1880 Agreement, together with other lands to the Weeminuche or Southern Ute Indians in partial exchange for lands from the then reservation of said Indians. Such lands are the subject of plaintiffs' claim in Case No. 47565, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

Since June 30, 1910, and prior to June 28, 1938, defendant made other and further sales and disposals of certain of said lands, by sales thereof for cash, by homestead or other entries under the public land laws for less than the agreed minimum price per acre, by setting apart and reserving such lands as national reservations or for other public uses, or by otherwise classifying, reserving, or withdrawing such lands from entry and sale under the public land laws. Plaintiff is advised, believes, and therefore avers that defendant has not accounted to plaintiffs for such cash sales or paid plaintiffs the minimum per acre price for lands entered under the homestead laws in accordance with the Act of July 28, 1882 (22 Stat. 178) or otherwise, nor paid plaintiffs the value of such lands set apart and reserved as national reservations or classified, reserved, or withdrawn from entry and sale under the public land laws. Defendant has never rendered to plaintiffs a true, complete and proper account with respect to said property of plaintiffs and said trust funds.

7. Wherefore plaintiffs pray that defendant make a full and true discovery and disclosure of acreage

> sold, homesteaded, or otherwise withdrawn for national reservations or for other public uses, or otherwise classified, reserved, or withdrawn from entry or sale under the Public Land Laws prior to June 28, 1938, and not heretofore paid for by defendant in connection with the suit by plaintiffs brought in 1909 as hereinabove paragraph 6 recited and not the subject of the actions pending in this Court which are referred to in paragraph 6 hereof; and that defendant be adjudged liable to plaintiffs for such sales and appropriations of lands in such amount as upon a complete and accurate accounting this court may find due and owing to the plaintiffs as reasonable and just compensation, but in no event less than the minimum price at which defendant has agreed to sell such lands.

All the judges of the court are agreed that the land now in issue was, in the language of the judgment entered in Case No. 46640, "land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time * * * disposed of as free homesteads * * *." The preceding language of the stipulation—"the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but whether included therein or not"—is certainly sufficient to cover the land now in issue. Therefore, I see no way to avoid the conclusion that the final judgment entered in that case bars appellee's right to recover. The fact that the plaintiffs or their counsel had an undisclosed or unexpressed intention to exclude the land in controversy from the stipulation does not alter the conclusive effect of the judgment entered. *United States* v. *William Cramp Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Utah Power & Light Co.* v. *United States*, 70 Ct. Cl. 391, 42 F. 2d 304 (1930).

COURT OF CLAIMS

Ct. Cls. No. App. 7-66
Supreme Ct. No. 515

O. T. 1970.

THE UNITED STATES

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the items contained herein constitute the complete record of original papers as filed in this court in the above cause. These papers, for transmittal to the Supreme Court of the United States under that court's Rule 25(1), are as follows:

The Record on Appeal from the Indian Claims Commission (Dkt. No. 328), and a supplement thereto. (These records are contained in two bound and indexed volumes, together with three accordian type folders and one large Manila envelope).
Appellant's Brief to the Court of Claims.
Appellee's Brief.
Appellant's Reply Brief.
Court order remanding case to Indian Claims Commission.
Appellant's motion for rehearing.
Appellee's motion to vacate order of remand.
Appellant's response to motion to vacate.
Court order denying Appellant's motion for rehearing and Appellee's motion to vacate, etc.
Additional Findings of fact of Indian Claims Commission, together with Supplemental Record on Appeal (contained in one accordian type folder).
Opinion of the Court by Nichols, J. Dissenting opinions by Skelton, J. and Cowen, Ch. J.

[SEAL]

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the Court of Claims at Washington City this 25th day of November, A. D., 1970.

Clerk, United States Court of Claims.

EXCERPTS FROM PETITIONER'S EXHIBIT No. 24

GENERAL ACCOUNTING OFFICE REPORT RE: PETITION OF THE SOUTHERN UTE TRIBE OR BAND OF INDIANS INDIAN CLAIMS COMMISSION NO. 328

INTRODUCTORY

The following report was prepared in response to a letter from the Attorney General dated March 11, 1952, in which it was requested that a report be prepared for use before the Indian Claims Commission in connection with petition numbered 328 of the Southern Ute Tribe or Band of Indians, filed before the Commission on August 10, 1951, under authority of the act of August 13, 1946, 60 Stat. 1049.

Petitioner alleges that pursuant to the act of June 15, 1880, 21 Stat. 199, the Confederated Bands of Ute Indians, which included petitioner, ceded to the United States all of their lands in Colorado, except for certain lands on the La Plata River, on which the petitioner agreed to remove and settle, and which was to constitute its reservation.

Petitioner further alleges that the act of February 20, 1895, 28 Stat. 676 [677], set aside and defined the boundaries of the reservation promised by the 1880 act, consisting of approximately 1,075,000 acres; that under the provisions of the 1895 act lands within the Southern Ute Reservation could be disposed of under the desert, homestead, and townsite laws, and under the coal, mineral, stone, and timber laws, except that homestead settlers were to pay not less than $1.25 per acre; and that this act also provided that after payment of certain moneys to the Indians as set out therein, and deducting the expenses of the survey and sale of said lands, the

proceeds were to be held in trust by the United States for the sole benefit of the Southern Ute Indians.

It is also alleged that in accordance with the provisions of the 1895 act, the Presidential Proclamation of April 13, 1899, 31 Stat. 1947, opened approximately 523,079 acres of said reservation to settlement and disposal under the public land laws, and set aside approximately 157,641 acres for allotments to the Indians. Of said 523,079 acres, petitioner alleges that the United States disposed of approximately 220,495.17 acres without compensation being received therefor.

Petitioner further alleges that the United States disposed of approximately 81,953.18 acres for compensation but has made no accounting of the proceeds thereof to petitioner.

Petitioner prays for a judgment in an amount which will provide fair and just compensation for the approximately 220,495.17 acres disposed of by the United States without the payment of compensation, and for a complete and proper accounting of the proceeds of the approximately 81,953.18 acres of land for which the United States received compensation, less any proper credits or set-offs, and for such other relief as the Commission may deem fair and equitable.

There is set out on pages 4 to 36 an accounting of the proceeds derived from the sale of lands pursuant to the act of February 20, 1895, *supra*, during the period February 20, 1895, to June 30, 1951, together with an accounting of the interest on said proceeds during the period February 12, 1929, to June 30, 1951. Such an accounting covering the period February 20, 1895, to December 31, 1946, was included in the reports of this Office transmitted to the Attorney General June 24, 1949, and March 12, 1951, relative to petitions 46640 and 47567, respectively, of the Confederated Bands of Ute Indians, both before the Court of Claims.

Disbursements made for the benefit of petitioner jointly with other Indians under the jurisdiction of the Consolidated Ute Agency, Colorado, under other than treaty appropriations, during the period July 1, 1948, to June

30, 1951, are set forth in section D of the report of this Office transmitted to the Attorney General January 29, 1953, relative to petition numbered 327 of the Confederated Bands of Ute Indians before the Indian Claims Commission.

DISBURSEMENTS MADE BY THE UNITED STATES PURSUANT TO THE ACTS OF FEBRUARY 20, 1895, FEBRUARY 12, 1929, AND JUNE 13, 1930

The agreement of March 6, 1880, as ratified and amended by the act of June 15, 1880, 21 Stat. 199, provided for the settlement of the Southern Utes on agricultural lands on the La Plata River or in its vicinity in Colorado, such lands being a part of the Ute Reservation in Colorado prior to that time, and further provided that if there were not sufficient agricultural lands in Colorado, then the Southern Utes were to be located on or in the vicinity of the La Plata River in New Mexico. Pursuant to said act there was established the Southern Ute Reservation.

The act of February 20, 1895, 28 Stat. 677, provided:

> "That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.
>
> "Sec. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen

hundred and eighty, entitled 'An Act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same,' and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.

"Sec. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved.

"Sec. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a

title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands: *Provided*, That before said lands shall be open to public settlement the Secretary of the Interior shall cause the improvements belonging to the Indians on the lands now occupied by them to be appraised and sold at public sale to the highest bidder, except improvements on lands allotted to the Indians in accordance with the provisions of this Act. No sale of such improvements shall be made for less than the appraised value, and the several purchasers of said improvements shall, for thirty days after the issuance of the President's proclamation, have the preference right of entry of the lands upon which the improvements purchased by him are situated: *Provided further*, That the said purchase shall not exceed one hundred and sixty acres: *And provided further*, That the proceeds of the sale of such improvements shall be paid to the Indians owning the same.

"Sec. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years, and, when paid, the money to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; also to Ignacio, head chief; to Buckskin Charlie, as chief of the Moaches, and Mariano, as chief of the Weeminuches, the sum of five hundred dollars each; also to Tapucke and Tabewatch, as chiefs of the Capotes, the sum of two hundred and fifty dollars each; that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in

the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.

"Sec. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe."

By Presidental proclamation of April 13, 1899, 31 Stat. 1947, part of the Southern Ute Reservation was opened for settlement and entry under the terms of and subject to all the conditions, limitations, reservations and restrictions contained in the aforesaid act.

The records disclose that during the period April 13, 1899, to June 30, 1951, an aggregate of $215,985.32, being the proceeds from the sale, etc., of said lands, was received from the following sources:

Cash sales		$180.00
Sale of coal land		16,808.00
Desert land entries		74,150.97
Sale of excess acreage		190.16
Homestead entries		27,204.35
Homestead application fees		375.09
Sale of isolated tracts		3,421.54
Preemptions		568.68
Public sales		175.98
Soldiers' additional homestead entries		526.61
Sale of timber and stone land		88,043.76
Unclassified receipts	(a)	4,340.18
		$215,985.32

(a) It was not possible to determine the source of these receipts for the reason that certain of the records are missing from the files of the General Accounting Office.

Of said $215,985.32, the sum of $7.74 was erroneously credited to the Confederated Bands of Ute Indians under the act of June 15, 1880, 21 Stat. 199, and the balance of $215,977.58 was set up on the books of the United States Treasury under the heading "Proceeds of Southern Ute Reservation" (see page 12, item (a)). Said sum was augmented by $9,064.63 received from miscellaneous sources (see page 12, item (b)), making an aggregate of $225,042.21 available for disbursement. Of the sum so available, $223,222.93 was disbursed (see page 12, item (c)), $193.25 was transferred to "Confederated Bands of Utes 4% Fund" (see page 12, item (d)), $1,617.03 was returned to purchasers of land, and the balance of $9.00 was standing to the credit of the Southern Ute Tribe or Band on the books of the Treasury as of June 30, 1951.

The act of February 12, 1929, 45 Stat. 1164, as amended by the act of June 13, 1930, 46 Stat. 584, provided that funds in excess of $500 held in trust by the United States in principal accounts on the books of the Treasury to the credit of an Indian Tribe, upon which interest was not otherwise authorized by law, should bear simple interest at the rate of four percent per annum.

Pursuant to said acts, the sum of $89,344.16 (see page 16, item (a)), was set up on the books of the Treasury under the heading "Interest on Proceeds of Southern Ute Reservation" (also carried as "Interest and Accruals on Interest, Proceeds of Southern Ute Reservation"), during the period February 12, 1929, to June 30, 1951. Of the sum so available, $87,596.17 was disbursed (see page 16, item (b)), $800 was transferred to "Interest on Ute 5% Fund, Southern Ute" (see page 16, item (c)), and $947.99 was in the hands of Paul D. Banning, Chief Disbursing Officer, as of June 30, 1951.

STATEMENT NO. 1

Disbursements made by the United States for the Southern Ute Band of the Confederated Bands of Ute Indians pursuant to the acts of February 20, 1895, 28

Stat. 677; February 12, 1929, 45 Stat. 1164; and June 13, 1930, 46 Stat. 584.

* * * *

[Total] (a) $310,819.10

* * * *

STATEMENT NO. 2

Statement disclosing the disposition of moneys available pursuant to the act of February 20, 1895, 28 Stat. 677, from:

"Proceeds of Southern Ute Reservation"

	Dr.	Cr.
Proceeds, sale of land	(a) $215,977.58	
Miscellaneous receipts	(b) 9,064.63	
Disbursements made for the Southern Ute Band of the Confederated Bands of Ute Indians as set out in Disbursement Schedule No. 1, pages 19 to 27		(c) $223,222.93
Transferred to: "Confederated Bands of Utes 4%		(d) 198.25
Repayment of purchase money		1,617.08
Balance standing to the credit of the Southern Ute Tribe or Band on the books of the Treasury as of June 30, 1951		9.00
	$225,042.21	$225,042.21

* * * *

[Footnotes (a)-(d) omitted]

STATEMENT NO. 3

Statement disclosing the disposition of moneys available pursuant to the acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, under:

"Interest on Proceeds of Southern Ute Reservation"

	Dr.	Cr.
Interest Warrants	(a) $89,344.16	
Disbursements made for the Southern Ute Band of the Confederated Bands of Ute Indians, as set out in Disbursement Schedule No. 2, pages 28 to 36		(b) $87,596.17
Transferred to: "Interest on Ute 5% Fund, Southern Ute"		(c) 800.00
Amount in the hands of Paul D. Banning, Chief Disbursing Officer, as of June 30, 1951		947.99
	$89,344.16	$89,344.16

* * * *

[Footnotes (a)-(c) omitted]

ABSTRACT NO. 1

Abstract of disbursements made by the United States for the Southern Ute Band of the Confederated Bands of Ute Indians pursuant to the acts of February 20, 1895, 28 Stat. 677; February 12, 1929, 45 Stat. 1164; and June 13, 1930, 46 Stat. 584.

Schedule No.	Name of appropriation or fund	Amount disbursed
1	Proceeds of Southern Ute Reservation	(a) $223,222.93
2	Interest on Proceeds of Southern Ute Reservation	(b) 87,596.17
Total		(c) $310,819.10

* * * *

[Footnotes (a)-(c) omitted]

Excerpts From Petitioner's Exhibit No. 25

GENERAL ACCOUNTING OFFICE
Washington

The following report of the General Accounting Office "Re: Petition of the Confederated Bands of Ute Indians, Court of Claims No. 47567," consisting of 673 pages was prepared in the Indian Tribal Section of the Claims Division of the General Accounting Office. The information and data contained therein which were compiled from the records of the General Accounting Office, as supplemented by certain information obtained from the annual reports, ledgers, etc., of the Office of Indian Affairs, are believed to be true and accurate in all respects and are hereby so certified under the seal of the General Accounting Office this 12th day of March 1951.

/s/ E. B. Smith
Chief, Indian Tribal Section

/s/ A. B. Thomas
Chief, Claims Division

/s/ Frank L. Yates
Acting Comptroller General
of the United States

Seal of
General Accounting
Office

The fund "Indian Moneys, Proceeds of Labor" was established pursuant to the act of March 3, 1883, 22 Stat. 590, which reads, in pertinent part:

> "The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

The act of March 2, 1887, 24 Stat. 463, authorizing disbursements from said funds reads, in pertinent part:

> "That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

The foregoing acts were amended by the act of May 17, 1926, 44 Stat. 560, which reads:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter all miscellaneous revenues derived from Indian reservations, agencies, and schools, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor," and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf

they are collected, subject, however, to the limitations as to tribal funds, imposed by section 27 of the Act of May 18, 1916 (Thirty-ninth Statutes at Large, page 159).

"SEC. 2. The Act of March 3, 1883 (Twenty-second Statutes at Large, page 590), and the Act of March 2, 1887 (Twenty-fourth Statutes at Large, page 463), are hereby amended in accordance with the foregoing."

The aforesaid acts were further amended by section 2 of the act of June 13, 1930, 46 Stat. 584. Said section reads:

"'SEC. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund 'Indian Money, Proceeds of Labor,' shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.'"

Pursuant to said act of March 3, 1883, as amended, certain classes of receipts pertaining to the Confederated Bands of Ute Indians, and the Uintah Band of Ute Indians were set up under the general heading "Indian Moneys, Proceeds of Labor," and carried on the ledgers of the Department of the Interior under four subsidiaries, viz: "Uintah and Ouray Indians (also carried as "Proceeds of Labor, Uintah and Ouray Indians"); "Southern Ute Indians" (also carried as "Proceeds of Labor, Southern Ute Indians"); "Navajo Springs Indians" (also shown as "Indian Moneys, Proceeds of Labor, Fort Lewis Indians"); and "Ute Mountain Indians" (also carried as "Proceeds of Labor, Ute Mountain Indians"). There are set out on pages 493 to 503 statements disclosing the sources and amounts of receipts under the foregoing headings, and the disposition thereof.

The act of February 12, 1929, 45 Stat. 1164, as amended by the act of June 13, 1930, 46 Stat. 584, provided that simple interest at the rate of 4 per cent per annum should be paid on funds in excess of $500 held in trust by the United States to the credit of an Indian tribe, if interest was not otherwise authorized by law.

Pursuant to said acts, interest was set up under the headings: "Interest on Proceeds of Labor, Southern Ute Indians"; "Interest on Proceeds of Labor, Uintah and Ouray Indians"; and "Interest on Proceeds of Labor, Ute Mountain Indians." There are set out on pages 504 to 506 statements disclosing the disposition of the interest so set up.

With reference to disbursements set out in Statement No. 39 and Disbursement Schedules Nos. 38, 40, and 41, under the caption "Unidentified items," and receipts set out in Statement Nos. 42 and 43, under the caption "Unclassified receipts," it was found impossible to determine the purposes for which the disbursements were made and the items for which the receipts were collected due to the fact that many of the fiscal officers' accounts, covering the period from 1923 to 1926, were damaged by fire, and for the further reason that certain of the records of the General Accounting Office are missing.

STATEMENT NO. 42

Statement disclosing the disposition of moneys available pursuant to the act of March 3, 1883, 22 Stat. 582, 590, from:

"Indian Moneys, Proceeds of Labor, Southern Ute Indians"

	Dr.	Cr.
Miscellaneous receipts	(a) $19,361.97	
Transferred from: "Indian Moneys, Proceeds of Labor (Shebit)"	(b) .16	
Disbursements made for the benefit of the Southern Ute Band of the Confederated Bands of Ute Indians as set out in Disbursement Schedule No. 39, pages 511 to 519.		(c) $13,963.57
Transferred to: "Indian Moneys, Proceeds of Labor, Navajo Springs Indians"		(d) 5,004.78
Balance on the books of the Treasury as of December 31, 1946		393.88
	$19,362.13	$19,362.13

(a) Revenue derived from the following sources:

Advertising fees	$76.70
Coal royalties	112.71
Grazing fees	9,036.74
Interest on official accounts	559.55
Lease of tribal lands	172.32
Payment for damages to telephone line	7.00
Carried forward	$9,965.02

Brought forward	$9,965.02
Payments for railroad right of way	3,290.00
Payment for threshing services	419.80
Rental of livestock	80.41
Rental of school building	12.00
Sale of agricultural implements	75.00
Sale of farm and dairy products	965.46
Sale of iron	110.00
Sale of livestock	1,643.80
Sale of rifles, separator, and typewriter	18.00
Sale of subsistence	60.63
Sale of timber	125.00
Sale of water	570.00
Trespass fees	2,026.85
	$19,361.97

Of this amount $237.75 was disbursed without being deposited and for the balance of $19,124.22, see page 636, Item (a).

(b) This amount was transferred as the result of an erroneous posting.

* * * *

[Footnotes (c), (d) omitted]

STATEMENT NO. 45

Statement disclosing the disposition of moneys available pursuant to the acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, under:

"Interest on Proceeds of Labor, Southern Ute Indians"

	Dr.	Cr.
Interest warrants	(a) $219.47	
Balance on the books of the Treasury as of December 31, 1946		$219.47
	$219.47	$219.47

* * * *

[Footnote (a) omitted]

SUPREME COURT OF THE UNITED STATES

No. 515, October Term, 1970

UNITED STATES, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ORDER ALLOWING CERTIORARI—Filed November 16, 1970

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 411053 387

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the opinion and order of the United States Court of Claims in this case.[1]

OPINIONS BELOW

The opinions of the Indian Claims Commission are set forth in the appendix at pp. 70–93. The opinion of the Court of Claims, not yet reported, is set forth in the appendix at pp. 14–69.

[1] Although the decision of the Court of Claims is interlocutory in the sense that it does not finally grant or deny relief, but remands for computation of the amount of recovery, this Court has jurisdiction under 28 U.S.C. 1255(1). *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138; *Peoria Tribe* v. *United States*, 390 U.S. 468.

JURISDICTION

The decision of the Court of Claims was issued on March 20, 1970. On June 10, 1970, the Chief Justice extended the time for filing a petition to August 2, 1970. On July 29, 1970, he further extended the time for filing the petition until August 10, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission has jurisdiction under 25 U.S.C. 70 to entertain a claim filed in 1963 for a general accounting, brought up to date, of funds unrelated to any claims timely filed and pending before the Commission.

2. Whether a settlement agreement as to an Indian tribe's claims regarding land and property ceded to the United States by a specified Act of Congress bound the tribe as to a tract of land ceded both in that Act and, when the tribe failed to honor its obligations, by a subsequent Act of Congress.

STATUTES INVOLVED

The Indian Claims Commission Act, 60 Stat. 1049, at 1050, Section 2, 25 U.S.C. 70a, provides in pertinent part:

> * * * No claim accruing after August 13, 1946, shall be considered by the Commission.
>
> * * * * *

Section 12, 25 U.S.C. 70k, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be

submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

STATEMENT

The Southern Ute Tribe or Band of Indians filed a claim before the Indian Claims Commission under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70, *et seq.*, on August 10, 1951, three days before the expiration of the time set by Congress for receiving claims under the Act. 25 U.S.C. 70k. The Tribe sought compensation for more than 200,000 acres of land the United States was alleged to have taken from it by permitting it to be homesteaded without payments (for the benefit of the Tribe) required by statute, and an accounting for funds which the United States allegedly had received in payment for an additional 82,000 acres of land.

Although the facts and history of this case are somewhat complex,[2] a brief summary will suffice for an understanding of the issues raised in this petition. The Southern Ute Tribe or Band was among the several Confederated Bands of Utes which prior to 1880 had inhabited a large reservation area in western Colorado. By the Act of June 15, 1880, substantial parts of that reservation were allotted to individual Indians, and all the lands not so allotted became public lands. 21 Stat. 199. Particular difficulty was experienced in persuading the Southern Utes to give up their area of the reservation for allotments. For a while, they were permitted to remain; after several

[2] They are set out in full in the opinion below. *Infra*, pp. 14–28.

studies and efforts to solve the problem by legislation, Congress passed the Act of February 20, 1895, 28 Stat. 677, which in terms very similar to those of the 1880 Act provided for land allotments to individual Indians and opening of the ceded lands not so allotted as public lands.

Under both Acts, the United States was obligated to sell the public lands thus created for the benefit of the Indians and to serve as trustee of the funds. It did not honor that obligation, and in 1938 Congress enacted a special jurisdictional statute permitting the tribes to sue for the damages thereby suffered. 52 Stat. 1209. Several suits were filed, and ultimately the Confederated Bands of Utes—including the Southern Utes—negotiated a settlement with the government for 32 million dollars. The Confederated Bands agreed that this payment was a

> * * * full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 * * *." [App., *infra,* pp. 42–43.]

It was further agreed that:

> * * * the judgment to be entered in this case is res judicata, not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, dis-

posed of as free homesteads and set aside for public purposes. * * * [*Ibid.*]

The agreement was formalized in 1950 by judgment of the Court of Claims. *Confederated Bands of Ute Indians* v. *United States,* 117 Ct. Cls. 433.

Thus, when the present suit was filed in 1951, the United States defended against the Tribe's first claim, for compensation for land never sold for its benefit, on *res judicata* grounds. In connection with the claim for an accounting of the funds received for the 82,000 acres which allegedly had been sold, the government also raised the *res judicata* defense, and filed a general accounting of all the Tribe's funds—made for other purposes in 1938—which it then updated to June 30, 1951. These reports were filed on February 18, 1953. In 1963, the Tribe filed "exceptions" to these reports which sought to put in issue not only the funds relating to the 82,000 acres, but *all* tribal funds, and sought to have this accounting brought up to date. The United States objected that these were not "exceptions" but new claims that were neither timely under 25 U.S.C. 70k, *supra,* nor within the Commission's limited jurisdiction over claims accruing prior to August 13, 1946 (25 U.S.C. 70a, *supra*).

The Commission and the Court of Claims concluded that the lands in question here were not "effectively" ceded in 1880—although apparently so—and that the settlement agreement was limited to those lands "effectively" ceded rather than all lands identified as ceded by the Act (Pet. App. 28–29). Thus, they rejected the government's *res judicata* defense. As to the accounting claim, the Commission held that the

limitations period did not begin to run until the Indians received the accounting report, since they could not have known until then whether they had any claim (Pet. App. 38–39). The Court of Claims agreed that the request for a general accounting was timely, but on the ground that the "exceptions" were merely amendments which related back to the filing of the original claim (Pet. App. 39–40).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims improperly and markedly expands the jurisdiction of the Indian Claims Commission and, if permitted to stand, will seriously jeopardize the government's ability to bring cases before the Commission to a conclusion within a reasonable time, contrary to the plain intent of Congress.

1. The only request for an accounting timely filed before the Indian Claims Commission in this case sought an accounting limited to the funds derived by the government from the sale of 82,000 acres of Indian lands. Section 12 of the Indian Claims Commission Act, 25 U.S.C. 70k, limits the claims which the Commission can consider to those made before August 13, 1951, and no claim for an accounting as to any other lands or funds was filed by that date. Such a claim was first made in the Tribe's "exceptions" to the government's proposed accounting—exceptions which the Tribe filed in 1963. While the Court of Claims characterized the "exceptions" as amendments which related back to the original claim, this is analytically unsound. A general accounting covers *all* funds held by the United States for the Tribe and thus, in large

part, is not even remotely related to the matters raised by the complaint filed in 1951.

The limitation of Section 12 is jurisdictional, since the Act is a waiver of sovereign immunity. As in the case of the Tucker Act, 28 U.S.C. 1346, 2401, 2501, limitations on the time for filing suit under a waiver of sovereign immunity are jurisdictional in nature. "The United States, as sovereign, is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. See, also, *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; *Soriano* v. *United States*, 352 U.S. 270; *Edwards* v. *United States*, 163 F.2d 268 (C.A. 9): *Powers* v. *United States*, 390 F.2d 602 (C.A. 9); *Hamman* v. *United States*, 399 F.2d 673 (C.A. 9); *Eastern Freight Ways* v. *United States*, 257 F.2d 703 (C.A. 2); *Mulholland* v. *United States*, 361 F.2d 237 (Ct. Cls.); *Todd* v. *United States*, 292 F.2d 841 (Ct. Cls.). It follows that the court erred in directing the general accounting to be made.

2. Under Section 2 of the Act, 25 U.S.C. 70a, the Commission may consider only claims accruing on or before August 13, 1946.[3] Any malfeasance by govern-

[3] In fact, all but two of the accounting reports prepared for the Commission bear a uniform closing date of June 30, 1951. Although the five-year period 1946–1951 is not within the Commission's jurisdiction over claims, it does fall within the period for filing claims, and the accountings appear to have made to that date on that basis. The Commission cannot waive its jurisdictional limitations by ignoring them; only Congress is authorized to waive the government's defense of sovereign immunity. *United States* v. *Corrick*, 298 U.S. 435, 440.

ment officials regarding Indian funds occurring after that date is beyond the jurisdiction of the Commission to consider in making its award. By ordering a general accounting, however, the decisions below suggest that such malfeasances *will* be considered.

General accountings involve a painstaking analysis of each government transaction concerning Indian funds in the period covered, and contemplate that if a malfeasance is found—for example, a failure to deposit funds promptly in an interest-bearing account—that will be reported and compensated in the Commission's award. This not only greatly expands the Commission's statutory jurisdiction, but promises to make litigation endless. By the time the present accounting reports have been brought up to date (even now, a matter of almost twenty years) and exceptions have been filed and trial dates set, so much time will have passed that, on the same logic, a whole new round of updating must begin.

3. The effect of these rulings, particularly the latter one,[4] is to threaten a considerable enlargement of the Commission's docket at a time when it is clear Congress wishes its business to be done. The Commission is not a permanent judicial body, but one of fixed life span. Originally, it was to expire ten years after its first meeting. Section 23 of the Act, 60 Stat. 1055.

[4] We are informed that most of the claims before the Commission are already in the nature of general accounting claims. By the end of this fiscal year, it is anticipated that all reports on those claims will have been made, in each instance to a closing date of June 30, 1951. See n. 3 *supra*.

While its life span has three times been extended by five years (most recently, to April 10, 1972), 70 Stat. 624, 75 Stat. 92, 81 Stat. 11, and a further five-year extension is now under consideration, Congress has unmistakably indicated its impatience with the delays and its insistence that the Commission's work be finished.

Thus, the most recent extension of the Commission's life span expanded its membership from three to five, and required it to calendar all pending claims for trial on or before December 31, 1970. 81 Stat. 11. The accompanying House Report (No. 132, 90th Cong., 1st Sess., p. 3) stated:

> * * * While the subcommittee expressed sympathy for and recognized the difficulties under which the Commission has been and is presently laboring, it wishes to advise each Government agency, Indian tribe, and particularly the tribal attorneys involved, that their full cooperation is expected in order to complete the task facing the Commission before April 10, 1972. * * * The committee expects that the enlarged Commission will expeditiously set up and insist upon compliance with rules which will insure adjudication of the remaining dockets within the 5-year extension.
>
> The committee will not look favorably on future requests to extend the life of the Indian Claims Commission.

See, also, S. Rep. No. 72, 90th Cong., 1st Sess., p. 4. The Senate actually enacted a provision which would have barred any further extensions in the life of the Commission. While this was deleted from the bill in conference, the Conference Report noted that "[t]his

omission does not mean that the Congress will consider favorably further requests for extensions in the Commission's life. It is, indeed, the belief of the conferees that the Commission should do everything possible to assure that the initial trial of all pending claims is speedily completed." H. Conf. Rep. No. 179, 90th Cong., 1st Sess., p. 4. Similar sentiments have been expressed at the recent hearings before the Senate Committee on Interior and Insular Affairs regarding the need for a further extension, until 1977, of the Commission's life. Hearing, *Indian Claims Litigation,* 91st Cong., 2d Sess. (April 10, 1970), pp. 7, 33, 37, 45.

If the Indian tribes are now able to transmute remaining specific accounting claims into general accounting claims regarding *all* their funds in government hands, and to force those accountings to be updated from 1951 to the present, the Commission's docket will be greatly encumbered. General accounting cases are extremely complex. The preparation of general accounting reports is the work of a highly specialized group of government accountants in the Indian Tribal Claims Branch of the National Archives. Although there were 90 such accountants at an earlier date, the number has dwindled to 13 as scheduled reports have been filed; most of the remainder will be eligible for retirement before the end of the current fiscal year. Thus, the burden now of producing new general accounting reports would be substantial. At the recent congressional hearings, *supra,* the Archivist of the United States, Dr. James P. Rhoads, stated that to bring 32 of the Commis-

sion's 44 pending general accounting cases down to 1969 would require an additional 224 man-years of labor—for a staff of thirteen, this would take until 1977. Such a prolongation and expansion of the Commission's work would contravene the will of Congress, as reflected in the express statutory jurisdictional limitations previously discussed.

4. With respect to the second question presented, it is our contention that the Court of Claims erred in not accepting the government's *res judicata* defense, based on the settlement agreement approved in *Confederated Bands of Ute Indians* v. *United States,* 117 Ct. Cls. 433. It is not seriously disputed, even by the majority of the Court of Claims, that the plain language of the 1880 Act, 21 Stat. 199, ceded the lands here in question to the United States (Pet. App. 19, 21). Nor is it questioned that the prior decision is *res judicata* as to claims arising out of lands so ceded. Accordingly, this claim, including the claim for a general accounting, is barred. *Commissioner* v. *Sunnen,* 333 U.S. 591; *Cromwell* v. *County of Sac,* 94 U.S. 351. The fact that the prior judgment was entered upon a stipulation does not lessen the dignity or force of the judgment as a bar. *Swift & Co.* v. *United States,* 276 U.S. 311, 324, and cases therein cited. See, also, *United States* v. *International Bldg. Co.,* 345 U.S. 502.

The court reached its contrary conclusion by reasoning, on the basis of the history of these lands and the Act of 1895, *supra,* that the lands had not been "effectively" ceded by the Act of 1880; and, further, that the settlement agreement referred only to those lands which had been "effectively" ceded by the 1880 Act,

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not lands named within the Act as ceded. We recognize that this decision, although wrong in our view in both respects, does not in itself involve legal issues of general importance. We note, however, that although the precise facts may not recur, the generosity of the court's reasoning [5] may invite others to attempt repudiation of other settlements or to be more reluctant to enter into settlements in the future.

Of the 158 Commission cases which thus far have proceeded to judgment, 81 (in addition to this case) have been settled by compromise. There are 159 cases which remain to be disposed of; a judgment which threatens interference with settlements already made or waiting in the wings should not, if erroneous, be permitted to stand. It is important, both for the cases already settled and for the Commission's future work, that the parties be able to compromise cases in the reasonable certainty that judgments, once entered, will be binding.

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[5] Compare *Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana* v. *United States*, 417 F.2d 1340, 1342 (Ct. Cls.).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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EDMUND B. CLARK,
Attorney.

AUGUST 1970.

APPENDIX A

In the United States Court of Claims

Appeal No. 7-66

Ind. Cl. Comm. Docket No. 328

17 Ind. Cl. Comm. 28

21 Ind. Cl. Comm. 268

(Decided March 20, 1970)

THE UNITED STATES v. SOUTHERN UTE TRIBE OR BAND OF INDIANS

W. Braxton Miller, with whom was *Assistant Attorney General Shiro Kashiwa*, for appellant.

Glen A. Wilkinson, attorney of record for appellees. *Wilkinson, Cragun & Barker*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

NICHOLS, *Judge*, delivered the opinion of the court:

This case comes to us on appeal from a decision of the Indian Claims Commission which, in an interlocutory order dated May 16, 1966, found the appellant, the United States, liable to the appellee, the Southern Ute Tribe or Band, for (1) just compensation for taking 230,547.44 acres of land, and for (2) a "further and complete" accounting for funds

held in trust. Although notice of appeal was filed on August 4, 1966, after briefing and oral argument we remanded to the Commission for supplemental findings of fact. Upon making the requested findings the Commission again transmitted the case to us, whereupon the parties, relying on earlier submitted briefs, again presented oral argument. Since the Commission's supplemental findings tended to support its original decision, the issues now on appeal are those previously posed.

The Southern Utes, an incorporated tribe composed of the Moache and Capote bands, allege that the United States violated a treaty agreement made with their ancestors and ratified by Congress in 1895. Briefly, the terms of the treaty, which are not in dispute, provided that the western sector of the Southern Ute reservation be set aside for all those who would not accept allotments in severalty. The eastern sector was for Southern Utes who would accept allotments. The unallotted lands in this latter sector were to be opened to white settlers for the cash price of not less than $1.25 per acre. All proceeds, save certain offsets, were to be held by defendant in trust for the exclusive benefit of the Southern Utes. In April 1899, these lands were officially opened to public entry (31 Stat. 1947). In May 1900, however, Congress passed the Free Homestead Act (31 Stat. 179, 43 U.S.C. 179) which allowed settlers to obtain this land without monetary consideration. The Southern Utes now seek just compensation for 230,547.44 acres of their land that defendant thus donated to homesteaders in violation of the 1895 treaty. Defendant's primary defense is that all claims relating to these free land dispositions have been settled finally by prior adjudication. We disagree with this contention for the reasons stated in the following discussion and analysis.

In the mid-1800's, the Ute Indians occupied an extensive region which spanned western Colorado, northern New Mexico and Utah. On March 2, 1868, these Indians—the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Utes—ceded their aboriginal lands to the United States in exchange for a 15.7 million acre reservation situated wholly within the boundaries of Colorado. (Treaty of 1868, 15 Stat. 619, 2 Kappler 990). Subsequently,

the bands came to be known under different names: The Tabequaches were called the Uncompahgre Utes; the Moache, Capote *and* Weeminuche, the Southern Utes; and the Yampa, Grand River and Uintah, the White River Utes. Collectively these three Bands were informally organized and styled as the Confederated Bands of Utes.

Some years after the Treaty of 1868 another agreement was forged—the Brunot Cession of 1873. (18 Stat. 36, 1 Kappler 151). The discovery of large and valuable mineral deposits on the Ute Reservation had prompted the United States to persuade the Confederated Bands to cede 3.7 million acres of the east-central portion of their reservation. The relevance of this agreement lies in the geographical consequences it effected. (For convenience, in referring to these geographical sectors we will use the Royce Area numbers taken by the parties form Charles C. Royce's Map of Colorado (1) *Indian Land Cessions* (18th Ann. Rep., B.A.E. 1896–1897, Part II)). By carving out this slice of land (Royce Area 566), the cession nearly severed the original 1868 reservation into two disproportionate parts. Royce Area 616, the larger part, lay mostly north of 566, but a corridor 20 miles across ran north and south between 566 to the east and Utah to the west. Wedged between the New Mexico border and the southern boundary of the Brunot Cession, however, was the remainder of the reservation (Royce Area 617). This narrow strip, 15 miles across, ran from the reservation's eastern boundary to a point just 20 miles short of the Utah border, its western boundary. The occupants of Royce Area 617 were and still remain the Moache, Capote and Weeminuche Bands, then known as the Southern Utes.

By another agreement ratified by the Act of June 15, 1880 (21 Stat. 199, 1 Kappler 180), the Confederated Bands ceded, or purported to cede, with certain exceptions, the remainder of their diminished 1868 reservation. Because of the critical importance of this cession, we quote the pertinent sections verbatim.

* * * * *

> The * * * chiefs and headmen of the confederated bands of Utes * * * agree and promise to use their best endeavors with their people to procure their consent *to*

cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

* * * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians *in severalty* * * *.

* * * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities * * *, and so much more as Congress may appropriate for that purpose; and that *a commission shall be sent to superintend the removal and settlement of the Utes*, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with [other necessities], and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: *One-third to those who settle on the La Plata River and vicinity* [*the Southern Utes*]; one-half to those settling on Grand

River and vicinity [Uncompahgre Utes], and one-sixth to those settling on the Uintah Reservation [the White River Utes].

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and [otherwise provided by law or treaty], agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies for the Uncompahgres and Southern Utes be removed to and established at suitable points, to be hereafter selected, upon the lands to be set apart, and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Fifth. [Prior treaties are reaffirmed.]

* * * * *

Sec. 2. [Five Commissioners were authorized to present the agreement to the Utes for their ratification, and upon ratification to assess improvements and take a *census* of the Southern Utes, Uncompahgre Utes, and White River Utes]. * * * [A]nd they [commissioners] shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this Act.

* * * * *

Sec. 3. *That the Secretary of the Interior be* * * * *authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement and severalty of said Indians as therein provided.* And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allot-

ments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement * * * and whenever the report and proceedings of said commissioners * * * are approved by the President * * *, he shall cause patents to issue to each and every allotee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, *and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands*, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; *but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at* [*$1.25*] *per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided in this act:* * * *. (Emphasis supplied throughout, except usual statutory italics.)

* * * * *

The most significant aspects to be gleaned from this Act, with respect to our analysis, is that the Confederated Bands (Southern Utes included) seemed to cede their *entire* Colorado reservation—Royce Area 616 *and* 617—and moreover promised to accept allottments in severalty in various sectors within and beyond reservation boundaries. As sole consideration for these promises, the Bands were to receive shares in the proceeds of unallotted land sales remaining after certain Government reimbursements. The Southern Utes were apportioned a one-third share and like their confederates understood that such monies would be held by defendant in trust

for their benefit. The Commission found that the Act of 1880 "reserved" Royce Area 617 for the Southern Utes. Although the plain language of the Act appears inconsistent with this finding, the following sequence of events capped by the Act of 1895 and Restoration of 1938 (both discussed *infra*) support the conclusion that plaintiffs at any rate did not cede their reservation (Royce Area 617) under the agreement of 1880.

Pursuant to the above act the Ute Commission was formed under the leadership of chairman George W. Manypenny. On November 21, 1881, the Commission submitted its report to the Secretary of the Interior (H.R. Doc., Vol. 10, Ser. No. 2018, 47th Cong., 1st Sess. 383 (1882)). Divided into three subreports, one for each band in the confederated trio, the report discloses that the removal of the Uncompahgre and White River Utes was not accomplished without some difficulty. Both bands, despite the terms of the above treaty, resisted removal with vehemence. Finally, however, they were persuaded to settle in Utah, outside the bounds of their former reservation. The Southern Utes, on the other hand, were to receive different treatment as forecast by the comments of Chairman Manypenny:

* * * * *

> When I went to the Southern [Ute] Agency, I found the prevailing opinion was that all the Southern Utes by the terms of the [1880] agreement were to be removed to and located on the La Plata River in Colorado and New Mexico. It was confidently expected that in a brief time the valleys of the Animas, Florida, and Las Pinos, &c., would be open to occupation and settlement by white people. The settlers in these valleys north of the reservation were impatient to enter and possess the land; and when it became known that I had instructed the contractors for surveying, on the completion of their work on the La Plata to pass over to and commence work on the Animas and Florida, there was not only disappointment, but great dissatisfaction manifested. It was asserted that I had deliberately perverted the language of the [1880] treaty and committed a great wrong.
>
> Under the terms of the agreement there was no other land in Colorado that I could have selected upon which to locate these Southern Utes. This I regard as a great misfortune, since their close proximity to the white settlements in the valleys of the streams on which they are to

be located will subject the Utes, after their lands are assigned to them and patents issued, and the residue of the lands are opened to occupation and settlement, to constant annoyance by evil-disposed persons.

* * * * *

* * * During my stay on the reservation I took occasion * * * to talk to the leading men * * * on the subject of their location in severalty. In these conversations I called their attention to the fact that the work the surveyors were doing was the preliminary step to such location [in severalty] and the placing of each family on its own land. On many occasions all that I said was listened to without a single word in response, and I did not find one who desired a house, or would agree to dwell in one if built for him on his own land. It will take time and careful management to induce these Indians to abandon their present [way of living] and adopt the new mode of life contemplated by the agreement.

In the meantime, and while the change is going on, they must be protected from annoyance. Intruders must be prevented from going in among them. If this be not done disorder will eventually reign, and all efforts to domesticate them will fail. *To prevent intrusion and guarantee proper order and protection, I can see no other way than to so modify the* [*1880*] *agreement, so far as these Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein. Then the land selected, and upon which the Indians are to be located, can be kept free from intruders. Id.* at 393. (Emphasis supplied).

Although we stated earlier that the plain words of the 1880 treaty seemed to indicate that the Southern Utes agreed to cede their lands to the United States, Manypenny's recitals give us some pause. They show that both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures. By suggesting that the reservation be closed to public entry indefinitely, Manypenny impliedly suggests that the United States forego, albeit not permanently, its rights under the 1880 treaty vis a vis the Southern Utes. Significantly, Manypenny's recommendation to modify the 1880 treaty was accepted by the full commission. The

record contains, however, no official acknowledgement or response.

Consequent to the departure of the Uncompahgre and White River Utes from Royce Area 616, Congress promulgated the Act of July 28, 1882 (22 Stat. 178), which declared all of Royce Area 616 as public land to be disposed of in accordance with the Act of 1880. Section 2 of the Act of 1882 provided, however, that the Secretary of the Interior "at the earliest practicable day, ascertain and establish the line between [Royce Area 616 and the land] now or lately occupied by the Southern Utes * * *." Five hundred dollars was appropriated for this survey. Section 3 provided among other things that the land opened in Royce Area 616 would only be disposed of on a cash basis not less than $1.25 per acre.

Plaintiff argues that by section 2 of the above act the United States formally recognized the thin strip of land (Royce Area 617) as the exclusive reservation of the Southern Utes. Defendant explains this survey as merely an attempt to cordon off the Southern Utes' land "until they could be located in severalty."

To implement the Act of 1882 the Secretary of the Interior was obligated to instruct the district land offices in Royce Area 616 how to accomplish disposal. From the text of a letter dated August 4, 1882, which ostensibly was sent out for this purpose under the approval of the Secretary of the Interior (Report of the Sec. of Int., Vol. 1, H.R. & Sen. Message & Doc., 47th Cong., 2d Sess. 41 (1882)), we have the following:

* * * * *

> The second section of the act of 1882 provides for a survey of the line between the lands occupied by the Southern Utes and the Ute lands exposed to entry by the act [of 1882]. The following is a decription of the line which is laid down on said map: Commencing *at* the southwest corner of the Ute *ceded* lands; thence extending the south *boundary* of the Ute *ceded* lands to the western boundary of the State of Colorado. (Emphasis supplied).

From this description it would seem that the Interior Department at least was already viewing the Southern Ute ter-

ritory as a permanent reservation not ceded under the terms of the 1880 cession. Specifically, the letter states that the survey line commence *at*, not *in*, the southwest corner of the ceded Ute land. Adhering to defendant's contention that *all* the lands were ceded in 1880, a literal interpretation of this letter would lead to an anomalous result. If the starting point was placed *at* the southwestern corner of Ute ceded land, the point would coincide with the converging point of the New Mexico, Colorado and Utah borders. The line could not extend to the western boundary of Colorado because it would start there.

It is also interesting to note how the Southern Utes themselves regarded their status during this time. In February of 1886, Ignacio, the principal chief of the Southern Utes visited Washington, D.C., along with several other of his subordinate chiefs and headmen, and appeared before the Senate Committee on Indian Affairs. The following is a colloquy between the committee and Buckskin Charley who although a subordinate to Ignacio, seemed to perform as spokesman for the Southern Utes (Sen. Rep. No. 836, 49th Cong., 1st Sess. 1-2 (1886)):

Question. Why do you come here for?
Answer. We come here to see if we cannot exchange our reservation for another.
Q. Where do you want the new reservation located?
A. We want to go west of the present reservation.
Q. Why is it better to go that way?
A. The present reservation is narrow and long and we want to go west *and see if we can't sell it.*
Q. Do you come to Washington with the idea that the Indian Bureau can do what you want?
A. We come expecting to get legislation.
Q. You hold title under statute?
A. *Yes. Id.* (Emphasis supplied).

Thus the Southern Utes were still in possession of their part of their old reservation under claim of right. The Southern Utes wanted to quit their reservation for a number of reasons. These were pastoral people not interested in farming—the livelihood which the Government then wanted them to adopt. Even if they were willing to farm, their reservation encompassed an insufficient amount of arable land. They complained also that the winters were too harsh and the loca-

tion too isolated from their traditional Indian neighbors. Their principal lament, however, was the increasing encroachments by neighboring white settlers. Consequent to the Brunot Cession of 1873 and the Act of 1882 opening up the bulk of the Utes' Colorado reservation, there was an influx of white settlers to the north of the Southern Ute reservation. To the south lay northern New Mexico, which was also being settled at that time. Thus the Indians were wedged between two white communities whose routes of trade and commerce followed the several rivers traversing the reservation. The Government was in a quandary. In a report to Secretary of the Interior dated April 5, 1888, J. D. C. Atkins, Commissioner of Indian Affairs acknowledged the following (Sen. Rep. No. 836, *supra*, at p. 3):

* * * * *

> It would be next to impossible to close up the thoroughfares across the reservation. To do that would be to erect a "Chinese wall" 110 miles long, virtually cutting off all trade and intercourse between the large and increasing communities on either side of the reservation; and yet as a matter of fact, we are bound by solemn treaty stipulations [Sec. 2 of Act of 1882?] with these Indians to prevent white people from entering upon or crossing said reservation.

Two bills were subsequently introduced in the Senate—S. 769 and S. 1916—to effectuate the removal of the Southern Utes from their reservation. These bills were never enacted into law and it was not until 1888 that the Congress took positive steps to ameliorate the Indians' plight. Section 4 of the Act of 1888 (25 Stat. 133, 1 Kappler 266) reads as follows:

> The Secretary of the Interior is hereby authorized to appoint a commission * * * with authority to negotiate with the band of [Southern] Ute Indians * * * for such modification of their treaty [1880?] and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of [Southern] Ute Indians * * * if said Indians shall determine to remove from their present location;

the report of said commission to be made to and subject to ratification by Congress before taking effect; * * *.

Plaintiffs assert that this act confirmed the "separation of the Southern Utes, as an entity, from the Confederated Bands * * *." That the Government negotiated exclusively with the Southern Utes for the "exchange of their reservation", is construed by plaintiffs "as a further Congressional recognition that the 15 mile strip [Royce Area 617] was the sole and absolute property of the Southern Utes and that they alone had the right to dispose of it." Perhaps believing it to be damaging to its case, defendant omits all reference to this act in its brief. Although the language of this act tends to favor plaintiffs' position it is by no means conclusive. It merely authorized the establishment of a commission to engage the Southern Utes in negotiations for the purpose of persuading them to do belatedly what the Uncompahgre and White River Utes had done some years earlier, namely, to vacate their reservation and move elsewhere. A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory. The agreement which emerged pursuant to this act substantiates this view. The Southern Utes agreed, *for no additional consideration*, to give up their reservation and remove and settle upon a reservation in San Juan County, Utah. Presumably, their evacuated reservation lands would then be sold in accordance with the Act of 1880 and the proceeds would be held for the collective benefit of the Confederated Bands in the prescribed proportions, that is, the consideration visualized in the 1880 agreement as accruing to the Southern Utes would still accrue.

Although routinely introduced, this agreement failed to receive Congressional approval; for six years it remained in limbo much to the dismay of the Southern Utes who continued to occupy their besieged reservation. In 1894 it was again introduced. Conceding the "anomalous position [of the Southern Utes] of having ceded their reservation and yet remaining on it", the Senate Committee on Indian Affairs favored ratification (Sen. Rep. No. 279, 53d Cong. 2d Sess. 2-3 (1894)). Its House counterpart, although concurring in

the view that the Southern Utes presented an anomalous situation, did not assent to ratification (H.R. Rep. No. 790, 53d Cong., 2d Sess. 2–3 (1894)). It believed that the proposed reservation was too large for the Southern Utes and hence would encourage their nomadic ways. Therefore, instead, the House Committee recommended enactment of a pending bill which was eventually passed as the Act of February 20, 1895 (28 Stat. 677). The stated purpose of this Act was to annul the agreement of 1888 and enforce the treaty of 1880 which sought to settle the Indians in severalty. Since this, too, is a very important Act, the pertinent language will be quoted verbatim:

* * * * *

Sec. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of [1880] * * * and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.

Sec. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be * * * set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to [certain government rights] * * *; and the Government shall maintain an agency at some suitable place on said lands so reserved.

Sec. 4. That at the expiration of six months from the passage of this Act the President * * * shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occu-

pancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws * * *; but no homestead settler shall receive a title to any portion of such lands at less than [$1.25] per acre, and shall be required to make a cash payment of 50 cents per acre at the time filing is made upon any of said lands: [certain provisos follow] * * *.

Sec. 5. That out of the moneys first realized from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years * * * to be divided equally among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; [certain allotments also made to specific chiefs and headmen] * * *; *that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon.*

Sec. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe. (Emphasis supplied.)

The Southern Utes could have allotments in severalty in Area 617, those who did not take these would move to a reservation in the western sector of Area 617; unallotted eastern sector lands would be sold not donated to homesteaders, for the Southern Utes' benefit. Unlike the Act of 1888, the Act of 1895 employs language ostensibly consistent with the Act of 1880 but it effects a conflicting result with the latter. We said earlier that by the plain terms of the Act of 1880, the Confederated Bands including the Southern Utes agreed to cede their entire Colorado reservation (Royce Areas 616 and 617) for consideration. Under the Act of 1895, however, the

Southern Utes separately ceded all over again a part of their reservation (Royce Area 617) in exchange for an *exclusive* and *additional* consideration! Section 5 not only states that the balance of land sales proceeds, deducting certain Government expenses shall be held in the U.S. Treasury for the sole use and benefit of the Southern Utes, but also that no offsetting reductions should be made in their rights under prior treaties because of this consideration. The meaning to be ascribed this section is a focal point of controversy between the parties.

The Commission found, subscribing to plaintiff's position, that the United States after the Act of 1880 pursued a patterned course of conduct which at all times regarded the Southern Utes as the rightful owners of Royce Area 617. This conduct culminated in the agreement of 1895 which the Commission viewed as an "ultimate act" recognizing plaintiffs' ownership rights. Defendant contests this appraisal by offering one of its own. It contends that the additional consideration was actually "special benefits" gratuitously given the Southern Utes to induce them to take lands in severalty. The benefits, defendant admits, were proferred "at the expense of the United States and other Ute Bands."

Although it is debatable, we believe the evidence weighs substantially in favor of the Commission's interpretation. We are not persuaded that defendant's post 1880 conduct followed any clear direction. It was ambivalent, with some actions favorable to plaintiffs' case and others not. During all this time, however, the fact remains that the Southern Utes were allowed to remain on their surveyed reservation for 15 years after the purported cession, and the right to remove them without their further consent was not asserted or exercised. Here we have an interpretation given to the 1880 treaty by both parties thereto. Congress recognized this anomalous situation and deemed it necessary to tender new consideration for the land. Defendant's "special benefits" theory is supported neither by the express language of the Act nor by the legislative history surrounding its passage. Although earlier reports described the Uncompahgre and White River Ute removals as somewhat hostile, due to their unwillingness to leave, Congress did not think it necessary then to encourage

their exodus with monetary inducements. On the contrary, it was reported by the Commissioner administering the White River Utes that military force was contemplated in accomplishing their withdrawal. (H.R. Doc. Ser. No. 2018, *supra*). Given the relations which existed between the United States Government and American Indians during this period it is difficult now to view the former as acting *ex gratia* wholly. The Southern Utes at that time, numbered slightly over 1,000. Certainly, if the United States wanted to make a gift it could have done so and still fallen far short of the promises embodied in section 5.

The more tenable theory, in our estimation, is that Congress recognized that by its protracted acquiescence in the Southern Ute occupation, Government rights to the land had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead. It may be that the obligation to deal justly and honorably with the Indian wards did not allow insistence on full implementation of the apparent terms of the 1880 agreement. On the other hand, the Southern Utes obviously did not see themselves as mere squatters. The Congress therefore decided that if the land was going to be acquired free and clear new consideration was necessary. Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880.

This position is bolstered by the Restoration of 1938 (5 Kappler 659), which the Commission found as defendant's second ultimate act in recognizing plaintiffs' ownership rights. In an order by the Secretary of the Interior issued pursuant to sections 3 and 7 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) the Southern Utes were restored to their tribal ownership of all lands not disposed of under the Act of 1895. The first paragraph of this order reads as follows:

> * * * [P]ursuant to the provisions of the Act of February 20, 1895 * * * the Southern Ute Band of Indians in Colorado *ceded* to the United States a large area of their reservation in the State of Colorado established *expressly for their benefit under the treaty of June 15, 1880* * * *. (Emphasis supplied).

Thus, defendant's officials do not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement. Such a statement by an executive agency bearing on the meaning of a treaty must be accorded great weight. *Creek Nation East of the Mississippi* v. *United States*, 165 Ct. Cl. 479, 486, *cert. denied*, 379 U.S. 843, *reh. denied*, 379 U.S. 918 (1964).

I.

A. Defendant's principal contention that the Southern Utes' claims have been finally settled by prior adjudication evaporates in the presence of our conclusion. The cases upon which it relies, namely the 1910 accounting case No. 30960 (45 Ct. Cl. 440 (1910)) and the 1950 settlement case No. 46640 (117 Ct. Cl. 433, 436 (1950)), were both intended to settle claims arising out of the 1880 cession exclusively. The Jurisdictional Act of 1909 (35 Stat. 788) which enabled this court to hear the accounting claim of the Confederated Bands was expressly limited to claims arising out of the Act of 1880. Hence any claims exceeding the limits of this mandate which were adjudicated in the 1910 accounting were improvidently heard. Not so limited was the Jurisdictional Act of 1938 (52 Stat. 1209) which authorized the 1950 settlement cases. On the contrary, this act conferred jurisdiction upon us to adjudicate *all* legal and equitable claims which the Ute Indians or any individual tribe or band thereof may have against the United States as to claims arising under *any* treaty of the United States. The stipulation—the bulwark of defendant's case—upon which we entered judgment in case No. 46640, however, was qualified as follows:

> * * * [T]he judgment to be entered in this case is *res judicata* * * * as to any land formerly owned or claimed by the plaintiffs [Conferedated Band of Utes] in western Colorado, *ceded to defendant by the Act of June 15, 1880* * * *. (Emphasis supplied.)

The stipulation recited numerous parcels in 616 and none in 617, though an effort was made for the list to be comprehensive. Since the Commission originally found that the agreement of 1880 only ceded land in Royce Area 616, it concluded summarily that this stipulation did not extinguish the instant claims.

We remanded this case to get a better idea of exactly what the parties meant to stipulate in 1950, namely, what they *then* thought was ceded by the Act of 1880. As reflected in the Commission's supplemental findings, plaintiffs' witness, a signatory to the stipulation and the then attorney of record for the Confederated Bands, gave testimony entirely consistent with the Commission's original findings. Defendant, however, insisting that the stipulation was self-explanatory and that the intent of the parties would have to be discerned from the written instrument, declined to put on witnesses. Of the Government signatories, only one is still living—Marvin J. Sonosky, Esquire, who is a member of our bar and is now in private practice. Having no independent recollection of the precise extent of the stipulation, Mr. Sonosky was unable to give useful testimony. He did indicate, however, in an affidavit submitted to the Commission, that as the attorney in charge of the 1950 Ute litigation he prepared a memorandum recommending settlement. Defendant withheld from the Commission this memorandum and related papers declaring them to be the work products of the attorneys of the Department of Justice and therefore privileged under Order of the Attorney General No. 381–67 (July 4, 1967).

We have recently considered in *Weiss* v. *United States*, 180 Ct. Cl. 863 (1967), the question of privilege for papers and opinions prepared by attorneys in the executive branch. The topic is comparatively new and the case law still scanty. We do not believe the privilege should extend beoynd the reasons for its existence, which are the freedom of the officials to receive staff advice in confidence, and the reluctance of courts to allow counsel in any lawsuit to raid and use the work product of his adversaries. Mr. Sonosky apparently needed to refresh his memory only, and introduction of his report in evidence was unnecessary. He was not in the employ of plaintiffs. The officials to whom Mr. Sonosky submitted his report, and who approved it, being dead, could not now be embarrassed. The report was not prepared for use in trial of the current or any then pending litigation, but was apparently to explain and justify a settlement. It certainly seems more than questionable whether executive privilege does or should apply to consultation by a witness of a document he

himself has prepared, for the purpose of refreshing his memory. If defendant is right, by consistency it should have a privilege to muzzle Mr. Sonosky in case his memory should be adequate without refreshment, yet no such right is claimed or can be imagined. Defendant in this instance has clearly not done all it might have done to clear up any uncertainty there may be about the intent of the parties to the stipulation. We think we are justified in inferring that neither party intended the stipulation to apply to Area 617. The most that can be said is that, by referring to territory ceded in 1880, the stipulation might have been intended to refer to the unexecuted, negated cession of Area 617, or it might not. If we must, as defendant urges, confine our view to the stipulation itself and other papers in that case, we find insufficient reason there to hold it applies to areas not *effectively* ceded. If we have a right to inquire directly into the understanding of the parties at the time, to resolve an ambiguity, defendant's handling of the Sonosky memorandum is pregnant with the admission that Mr. Sonosky, his memory refreshed, would not testify favorably to defendant. Since plaintiffs' testimony was unequivocal and no reason is suggested for disbelieving it, we conclude that the parties never intended the stipulation to apply to Area 617, and therefore it did not so apply.

B. Defendant's second defense is that plaintiffs, the Southern Utes who now only consist of the Moache and Capote bands, are not the exclusive owners of these claims. Specifically it contends that either the Uncompahgre and White River Utes have a joint interest in these claims, or alternatively that the Weeminuches, now known as the Ute Mountain Utes, are co-owners with plaintiffs. Because of this alleged failure to join interested parties, defendant, without citing precedent or other authority, urges reversal.

Responding to the first assertion, we find that the Uncompahgre and White River Utes have no interest in the instant claims. The 1895 agreement was made between the United States and the Southern Utes and only the latter were to have any share in proceeds. However apparently inequitable it may have been to grant the Southern Utes joint interest with the Uncompahgre and White River Utes in the

Area 616 proceeds and then give them exclusive interest in Area 617 proceeds, this was the stated intent of Congress not to be disturbed presently by this court. Any claim these tribes might raise against the Government to redress this matter would emanate from a right other than that of beneficiaries under the Act of 1895.

Defendant's second contention, raises a more perplexing question. Plaintiffs insist that the Weeminuches, by accepting the western reservation offered in the 1895 agreement, relinquished all claim to any land in the eastern sector. By accepting allotment in the east, the Moache, and Capote similarly relinquished claims to western lands. Hence, plaintiffs assert that since the instant claims all arise out of eastern land dispositions, they, by this mutual exchange, own the exclusive rights. The Commission, without referring directly to this cross-relinquishment theory, concurred in plaintiffs' conclusion, 17 Ind. Cl. Comm. at p. 52, saying:

> * * * [A]ny claim which the Ute Mountain Utes might have * * * would be *separate* from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation. (Emphasis supplied).

Fortunately, we can decide this issue without reaching the merits. Although the Commission's rules of practice and procedure were then and still are silent as to joinder questions, we hold that joinder of parties before the Commision is required only if the joint interest is existing. Assuming *arguendo* that the Ute Mountain Utes once owned an interest in this claim, we believe that they forfeited it by failing to timely file a claim before the Commission. Not only is this holding literally consistent with our own Rule 62 (a) which dictates joinder of any persons "*having* a joint interest adverse to the United States" (Emphasis supplied) but, it also does no violence to the salient concepts which underlie the joinder of "indispensable" parties rule. By rendering a judgment for plaintiffs, we do not prejudice the claim of the absent Ute Mountain Utes since their claim is no longer extant. Accordingly, consequent to such judgment, defendant will not suffer any inconvenience or harassment of further litigating this issue. We therefore hold that the Southern Utes, consisting of the Moache and Capote Bands, are *pres-*

ently the sole and exclusive owners of the instant claims. Hence they are eligible to pursue their remedy without additional parties.

C. Defendant conceded at oral argument that should we find that plaintiffs' claims were not extinguished by the 1950 settlement, and should we find plaintiffs the sole owners of their claims, then it is liable for gratuitously giving away plaintiffs' land. Questions of quantum, however, are still raised by defendant. First, it contends that the Commission's finding that defendant is liable to compensate for 230,547.44 acres is not supported by substantial evidence. Second, in order to avoid payment of interest, it says it is liable, if at all, for breach of contract, rather than to pay just compensation for a 5th amendment taking.

Deferring the acreage issue for the Commission, we now explore the nature of defendant's liability. Plaintiffs argue that under the 1895 Act their ancestors ceded whatever interest they had in their lands in trust to defendant in exchange for a beneficial interest in the proceeds. Sustained by the Commission below, plaintiffs assert that the free disposal of their lands with no substitute consideration offered by defendant was a taking under the 5th amendment entitling them to the just compensation. Plaintiffs, in support of their position, cite several cases, but the one we find to be most in point is *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 430 (1943).

Attached to the Jurisdictional Act of 1938, *supra*, was the so-called Adams Amendment which declared certain Ute land ceded under the Act of 1880 but not disposed of "to be the absolute property of the United States". In *Confederated Bands*, *supra*, we started with the proposition that "[t]he interests and obligations created by the agreement of 1880 do not fit readily into conventional legal concepts, such as trusts, agencies, debts or *contractual* obligations, and mortgages or security interests.", (p. 425), (Emphasis supplied). We went on to comment that "[t]he problem [was] further complicated by the fact that one of the parties * * * was a sovereign which could and did, regardless of the terms of the agreement, do what it pleased with the lands and their proceeds, giving the Indians the privilege of having their

legal rights determined only at long intervals * * * when the sovereign deigned to waive its immunity from suit.", (p. 425). In short, this was not the typical arms length contract relationship. Declining to consider whether the Government assumed the duty of trustee, we found that the indians under the agreement of 1880 retained an interest in the land—the right to the proceeds from sales—and that this interest was destroyed by the enactment of the Adams Amendment. Given these circumstances we held the destruction of this right to be a taking under the 5th amendment. Presently we are confronted with a like set of circumstances. The agreement of 1895—patterned after the 1880 agreement—embodies rights and interests which similarly evade accurate legal classification. Again, as in *Confederated Bands*, we have a situation where the Government cavalierly exercised its sovereign power without giving thought to providing consoling justification, let alone immediate chance for redress. By the Free Homestead Act of 1900 (31 Stat. 179) defendant promised that "all sums of money so released [herein] which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States * * *." By failing to make good this legislative promise of substitute consideration, defendant, in effect, dealt with plaintiff's land as its absolute property. Guided by our reasoning in *Confederated Bands*, we hold that plaintiffs, under the agreement of 1895, retained an interest in the ceded lands, namely, the right to receive sales proceeds or the equivalent thereof. As in *Confederated Bands*, this interest was destroyed by defendant's exercise of sovereign power. We hold therefore that the free disposal of the lands was a taking of plaintiffs' property right under the 5th amendment entitling them to just compensation.

This holding is not in conflict with *Confederated Salish & Kootenai* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966). The pertinent facts of that case are as follows: The Government in 1904 enacted legislation which authorized using plaintiff Indians' monies, held in trust, to defray the expenses of surveying their land. Since we had earlier found that by a prior treaty the Government had obligated itself to assume the cost of surveying, 167 Ct. Cl.

405 (1964), the issue subsequently presented was whether its use of Indian trust funds in violation of the treaty was a taking under the 5th amendment. We rejected this claim for two reasons: First, we noticed that since "legal title to the funds on deposit in the Treasury lay in the United States * * * [the] Indians' interest was, at most, that of a beneficiary, and a trustee's failure to live up to the standards imposed upon him is not a taking of title from the cestui but a breach of obligation.", 175 Ct. Cl. at p. 455. Our second reason, however, raised an even "deeper objection": "Money in the Federal treasury, even on deposit, cannot be simply equated with private property. Where such funds are involved it requires extraordinary circumstances, not present here, to find an eminent domain taking in a withholding or use of money by the Federal Government.", at pp. 455–56. We then proceeded to discuss the anomalous consequences plaintiffs' theory would engender with regard to "claimants who could show some sort of title to funds in the Treasury" and those who could not. We noted further that "[m]ere form sometimes has meaning, but usually not where, as here, the choice of forms seems haphazard and accidental. Considerations like these have impelled courts to shy away, generally, from designating the withholding or diverting by the defendant of funds in the treasury as an eminent domain taking.", at p. 456. Defendant argues here that its exempting of homesteaders from making cash payments and its failure to reimburse plaintiffs for loss of proceeds at most were breaches of contract or breaches of trust which, even if deplorable, do not constitute a 5th amendment taking. Defendant's breach of contract argument doubtless springs from our reasoning in *Confederated Salish*, wherein we noted, even though not argued by plaintiffs, that defendant's use of Indian monies for a project which it had earlier promised to finance itself was a breach of agreement, that plaintiffs' violated rights were contractual rights, and that the "taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment.", at p. 455. (Emphasis in original). This is applicable to a mere breach of a contract but perhaps not to its overt repudiation. *Lynch* v. *United States*, 292 U.S. 571 (1934).

But, as we have held, we need not find that latter situation here since whatever the exact legal nature of the parties' interests and obligations under the 1895 agreement, they are more than contractual. Thus defendant's breach of trust argument must also fail. Admittedly, under the agreement of 1895, defendant promised to hold *monies* in trust for plaintiffs; hence, as to this *res* it might well have been called a trustee. Still unclear and unresolved, however, is defendant's status as to the *lands* in question. In our earlier interpretations of the Act of 1880, whose land disposal provisions are sufficiently interchangeable with those of the act at bar, we never described defendant as being an actual trustee as to the lands. Specifically, we said that it was unnecessary to classify the Government as a trustee as to the 1880 lands in question, 100 Ct. Cl. at p. 432, and that it occupied a position "comparable to a trust", 112 Ct. Cl. at p. 130. If defendant is correct in reading *Confederated Salish* as standing for the proposition that breaches of trust are ineligible *per se* for treatment as 5th amendment takings, then we reply that defendant was *not* or not solely a trustee as to the lands in question. To say otherwise would necessitate overturning our previous decision that the enactment of the Adams Amendment was a taking. It is obvious, however, from *Navajo Tribe of Indians* v. *United States*, 176 Ct. Cl. 502, 364 F. 2d 320 (1966) that the United States is not exonerated from paying interest, as for an eminent domain taking, merely because the obligations of the United States with respect to the Indian lands involved in the claim were denominated as being, among other things, those of a trustee.

Since each taking occurred when the ownership of a homesteader became final, *Creek Nation* v. *United States*, 302 U.S. 620-22 (1938), we leave it to the parties to decide whether to assume the burdensome task of fixing the date of patent for each homesteader and compute the damages individually, or rather, as suggested by the Commission, to fix an average date or dates for the takings and compute the damages generally.

II.

Plaintiffs' second claim in this case is for an accounting of funds collected by the defendant in the course of selling

plaintiffs' land under the 1895 agreement. In their petition filed with the Commission on August 10, 1951, plaintiffs timely alleged a claim for an accounting for moneys received by defendant for some 81,953.16 acres of land disposed of in various ways other than as free homesteads. Responding to this claim, defendant submitted a General Accounting Office (GAO) report accounting for proceeds derived from sale of certain lands pursuant to the Act of 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951. Plaintiffs, after studying this report, filed exceptions to its contents. These exceptions were filed on June 12, 1963. Amended exceptions were subsequently filed on September 30, 1963. The Commission, in its interlocutory order, declared that defendant should make a further and complete accounting in line with specified rulings on each of plaintiffs' exceptions.

Defendant contests this decision on procedural grounds but makes no objection to the substance of any of the Commission's rulings on plaintiffs' exceptions. The procedural defenses are these: First, the accounting claim alleged in plaintiffs' originally filed petition was already rendered by prior adjudication. Second, the subsequent accounting claims amended in 1963 by way of exceptions were untimely filed additional claims. Hence the Commission under 25 U.S.C. 70(k) (1964) had no jurisdiction to rule on these claims. Third, the Commission's order for an up-to-date accounting was beyond its jurisdiction under 25 U.S.C. 70(a) (1964).

Regarding the first defense, we can dispose of it summarily. Since we have held that the 1950 settlement case No. 46640 was limited to settling accounts for the 1880 cession exclusively, we are compelled to find that plaintiffs' original accounting claim which derives from the agreement of 1895, was not included and is therefore still cognizable.

The second defense, however, does not admit to such easy disposition. Plaintiffs, perhaps content to rest on the Commission's reasoning, made no response to it in their brief. The Commission excused plaintiffs' late pleadings even though it recognized that the exceptions raised general accounting claims not referred to in plaintiffs' original petition. Despite the difficulties stemming from the language of

its enabling legislation—25 U.S.C. 70(k)—it reasoned that since plaintiffs could not have discovered any of their trustee's indiscretions until receiving the GAO report, this matter should be treated under the general legal principle that "limitations [do not] * * * begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.", 17 Ind. Cl. Comm. at p. 54. This result was deemed particularly equitable in the light of defendant's "unique position" of not having to render periodic accountings to its "Indian wards". "It [the Government] should not," said the Commission, "be allowed to take advantage of that fact for its own protection". *Id.*

Although we agree with the Commission's resolution of this issue, we do not feel compelled to comment on its novel rationale. Rather it is our belief that plaintiffs' exceptions were merely amendments to their timely filed petition. *United States v. Northern Paiute Nation*, 183 Ct. Cl. 321, 328, 393 F. 2d 786, 790 (1968); *The Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 585, 372 F. 2d 951, 959 (1967), and as such under the Commission's rule of procedure 13(c) they relate back to the time of original filing, thus curing the jurisdictional time bar defect. That the Commission itself did not similarly construe these exceptions is understandable, since its 1966 decision in this case was rendered without the guidance of the above mentioned cases. In *Snoqualmie* we allowed the late amendment because by the Snoqualmie's original petition the Government "was put on notice of the *possibility* that the Snoqualmie organization *might* expand the scope of its claim.", *Snoqualmie* at p. 589. (Emphasis supplied.) The same is true of the instant case. Admittedly plaintiffs' original petition requested an accounting for certain specified items. Responding to this petition, defendant submitted the GAO report but not without expressly restricting its introduction to the issues of liability raised in the petition. This precautionary measure, which the Commission found correctly to be specious, indicated, in our opinion, that defendant knew from the outset that to adequately respond to plaintiffs' petition it would have to submit the GAO report which contained various ignoble confessions. That it de-

clined to contest before the Commission the substance of plaintiffs' exceptions underscores its concession to the obviousness of its fiduciary misconduct disclosed in the report. We therefore find that the substance of plaintiffs' original petition put defendant on notice that it might have to defend against a broader claim. This finding was stated implicitly by the Commission, 17 Ind. Cl. Comm. at p. 55:

> We are of the opinion that the allegation for a specific accounting which brought forth the [GAO] accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a *sufficient basis* for requiring a further and complete accounting from defendant with regard to those items questioned by petitioner in its exceptions. (Emphasis supplied.)

Thus, following *Snoqualmie* and *Northern Paiute*, we hold that plaintiffs' exceptions relate back to the date of the original petition.

Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70(a) (1964) on its face bars the Commission from considering *any* claims accruing after August 13, 1946. In a previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accuring before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. *Gila River Pima-Maricopa Indians, et al.* v. *United States*, 135 Ct. Cl. 180, 186 (1956), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle that "a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar.

In view of the foregoing, we affirm as to the taking claim and all of the Commission's determinations related thereto, except for the finding that defendant is liable for just compensation for taking exactly 230,547.44 acres of land, the

Commission having offered no explanation as to how it reached this figure. In remanding to the Commission the task of approving the amount of compensation due, we therefore do not restrict plaintiffs' recovery or fix defendant's liability at the 230,547.44 figure. We also affirm the Commission's decision as to the accounting claim. Accordingly, we return the case to it with the task of conducting the accounting consistent with rulings which were the subject of this appeal.

Affirmed and remanded.

SKELTON, *Judge*, dissenting:

I respectfully dissent. I cannot agree with the reasoning of the majority nor with the result they reach. In my opinion, the Indians in this case, along with other Southern Ute tribes, were paid $31,938,473.43 in 1950 for the identical land involved here, together with other lands. This was the largest judgment ever awarded by this court since it was established in 1855. The attorneys who represented the Indians in the recovery of this tremendous judgment received an attorney fee of $2,800,000. See *Confederated Band of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). As will be seen in the following pages, the same Indians and the same attorneys are before the court again in this case asking that they be paid again (twice) for the same land, and the opinion of the majority is going to allow them to get this double payment. This results, in my opinion, in a shocking giveaway of millions of dollars of public money of the United States, and I cannot agree to it.

The overriding error in the opinion of the majority is the failure to honor the doctrine of *res judicata*. The crucial issue is whether the lands now at bar were included in the judgment of this court in *Confederated Bands of Ute Indians* v. *United States*, (Nos. 45585, 46640, 47564, 47566), 117 Ct. Cl. 433 (1950), in which, as stated above, the plaintiff and other Ute Indians were awarded over 31 million dollars in settlement of all of their claims, including those involving the lands in this case.

The judgment in No. 46640 (of over six million dollars) was entered pursuant to a stipulation signed by the attorneys for both parties to the law suit including the attorneys for

the plaintiff in the present suit. Using language as clear and unambiguous as is possible in the English language, the plaintiff Confederated Bands (which included the present Southern Ute Band, appellee in the suit before us) entered into a complete release, extinguishment and settlement of any and all of their claims regarding the land then at bar. The parties agreed that:

> * * * [J]udgment * * * shall be entered in this cause as *full settlement and payment* for the *complete extinguishment* of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash between July 1, 1910, and June 28, 1938, (b) disposed of as free homesteads from December 19, 1885, to June 28, 1938, and (c) set aside for public purposes during the period from June 30, 1910, to June 27, 1938. The plaintiffs concede that due and proper accounting has been made by the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938. * * * [Emphasis supplied.] [*Id.* at 436–37.]

The stipulation then went on to describe a "Schedule 1," which contained the legal descriptions of approximately 1,523,236.95 acres of land embraced by the stipulation, saying: "So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside." [*Id.* at 437.] This Schedule 1 contains 338 pages of single-spaced, typewritten legal descriptions of land. A land expert would find it difficult, if not impossible, to make sense of this Schedule 1. Even if he were to analyze it, months of his time would be required in the process. When confronted with the schedule of lands pursuant to settling case No. 46640, the government only ran a spot check of the schedule, and concluded that while there were errors, it was impractical to continue the examination. Evidencing an obvious lack of reliance on the correctness and completeness of Schedule 1, the stipulation signed by both parties went on to state:

> * * * However, the judgment to be entered in this case is *res judicata, not only* as to the land described in Schedule 1, *but, whether included therein or not, also* as to

any land formerly owned or claimed by the plaintiffs in western Colorado, *ceded to defendant by the Act of June 15, 1880* (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes. * * * [Emphasis supplied.] [*Id.* at 487.]

One searches in vain for a more clear, a more precise, a more final disposal and release of claims, than the one just quoted. As stated earlier, the key issue now is whether the lands presently at bar, lands from Royce Area 617 in southwestern Colorado, were included in this all-inclusive 1950 settlement. To determine this, one must analyze the history of the lands at bar, to determine whether these lands are part of the "land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 * * *."

The majority has explained the history of this land prior to 1880. To avoid being repetitious, I will start my analysis at 1880. The agreement of 1880 which resulted in the Act of 1880 was inspired by the so-called Meeker Massacre of 1879, in which an Indian agent and others were killed by certain Utes. The government sought to pacify the nomadic Utes by domesticating them, to the extent that each Indian would be given an allotment of agricultural land, upon which he would be converted from a nomad to a farmer. The vast majority of the 1869 Ute Reservation was not suitable for agricultural purposes; therefore, other lands had to be found. So under the Act of 1880, the Uncompahgre Utes were to move to agricultural lands on the Grand River in Colorado and Utah, and there receive their allotments. The White River Utes were to move to agricultural lands on the Uintah Reservation in Utah, and there receive their allotments. There was some suitable agricultural land in southwestern Colorado along the LaPlata River, and it was to this area that the Southern Utes were to move and receive their allotments. Section 3 of the 1880 Act authorized the Secretary of the Interior to survey the lands in the vicinities mentioned, and then the Commissioners were to cause allotments to be made to each and every Indian. Then the Act states, in clear, precise, and totally unambiguous language:

> * * * [*A*]*nd all the lands not so allotted*, the title to which is, by the said agreement of the confederated

> bands of the Ute Indians, and this acceptance by the United States, *released and conveyed* to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, * * *. [Act of June 15, 1880 (21 Stat. 199).]

Clearly (it could not be stated more clearly), the surplus of the lands after allotments were made was conveyed to the government by the 1880 Act. Therefore, the words in the 1950 case No. 46640, "ceded by plaintiffs to defendant in 1880," words which are descriptive of the lands involved in the 1950 settlement, include the lands presently before the court, and the doctrine of *res judicata* bars any further recovery.

Another look at the purpose of the 1880 Act reaffirms this conclusion. No new reservations were created by this Act. Rather, each tribe was merely moved to a certain area of land, out of which the tribe members were to receive individual allotments. No Uncompahgre Reservation was set up in Colorado and Utah, no White River Reservation was established in Utah, and no Southern Ute Reservation was established in southern Colorado.

How do appellees, the Southern Utes, try to get around this clear language? This is a difficult question for them to answer, and several different theories have been pressed upon the court at various stages of these proceedings. In its brief, the appellees say that the converse of the plain terms of the 1880 Act is true, namely, that the land now at bar was set apart and ceded to the Indians by the 1880 Act. This is patently insupportable by the clear terms of the 1880 Act.

The second theory was advanced when this case was first up for oral argument in 1967, and counsel for appellees made a straightforward and honest acknowledgement in open court that the lands at bar were indeed ceded to the government in 1880, but were in effect receded to the Indians by the Act of 1895. In light of this acknowledgement, the court entered an order of remand for the taking of additional evidence as to the intention of the parties to the 1950 stipulation. Apparently realizing the devastating damage that this acknowledgement did to their case, and that they could not prevail under it, appellees' counsel later said that the court "misconstrued" the acknowledgement, and sought to explain it

sway in its Motion to Vacate Order of Remand. The court did not misconstrue the statement. I was present and heard counsel make it. To clear the record, an examination of the 1895 Act to bring to light its true effect and purpose is in order. Unlike the Uncompahgre and White River Utes, who soon went to the land set aside for them and took allotments, the Southern Utes resisted allotments. Apparently, the life of the farmer did not appeal to them, so they continued living in a nomadic state within the bounds of the land set aside for their allotments. In 1888 they attempted to negotiate a settlement to move to Utah, but this was not ratified. So here the Southern Utes were, living within a land area, but refusing to take allotments as directed by the Act of 1880. To verify this, we have only to look at appellees' own evidence in this case. Exhibit No. 5 before the Indian Claims Commission contained a copy of a report dated April 28, 1894, from the Commissioner of Indian Affairs to the Congress. Speaking of the Southern Utes' presence on the land set aside for allotments by the Act of 1880, the Commissioner said, "Here they have remained ever since, being in the anomalous condition of having ceded their reservation and yet remaining upon it." The Commissioner in 1894 clearly understood the stalling tactics of the Southern Utes, and saw the necessity for bringing an end to this "anomalous condition." And indeed, it was to end this condition that the Act of 1895 was passed. This Act did not change the 1880 Act; the declared purpose of the 1895 Act was that "* * * [*T*]*he treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.*" [Act of February 20, 1895 (28 Stat. 677).] [Emphasis supplied.] A reading of the Act of 1895 makes it manifestly apparent that no cession, no reservation was encompassed. Rather, the Indians who would take allotments were given them, and those who refused were moved to a reservation in New Mexico and western Colorado. (This is the present site of the Ute Mountain Reservation—this land is not in issue in the case now before the court.) The remainder of the land in Royce Area 617 after allotments were assigned (this is the land at bar) was opened for settlement under the homestead laws for the first

time. (It should be noted that the sale of the land under the homestead laws was a violation of the Act of 1880. That is why, I believe, the 1950 settlement with the Indians included land "* * * disposed of as free homesteads from December 19, 1885, to June 28, 1938, * * *." [*Id.* at 437.]) So any argument that the land was receded to the Indians in 1896 cannot be sustained.

This leads directly to the third theory advanced by appellees regarding its retention or acquisition of the lands presently before the court. This theory, set forth in the Motion to Vacate Order of Remand and in the most current oral argument before the court, states in effect that the lands were "set-aside" in 1880, and officially recognized as Southern Ute lands in the Act of 1882. This argument, just as the prior arguments, misses the mark. The first half of this argument is true. The lands were indeed set-aside in 1880, but as we have shown, only for the purpose of taking allotments. The remainder after allotments was released and conveyed to the United States, and therefore clearly within the 1950 settlement with the Indians (Case No. 46640). The second part of the argument is a misinterpretation of the clear terms and purpose of the Act of July 28, 1882 (22 Stat. 178). By the time of this Act, the Uncompahgre and White River Utes had moved from the former Colorado Reservation to the areas set aside by the Act of 1880 for their allotments. Therefore, this vacated land area was now ready for settlement, and the Act of 1882 was passed to open this area for disposal under the terms of the Act of 1880. But the Southern Utes were still (and for thirteen more years continued) stalling, so the remainder after allotments of their set-aside land area was not ready for settlement. The government wished to keep this set-aside area intact for allotment purposes until allotments were made, so paragraph two was inserted in the Act of 1882, to provide for the surveying of a line between the lands opened, and the lands set aside for allotments. Keeping this area temporarily intact for allotments was the sole purpose and sole legal effect (before the majority opinion of this court in this case) of the Act of 1882. There is again a complete absence of any words of cession or reservation. Therefore, this theory advanced by appellees is without merit.

In fact, no theory has been advanced by the Southern Ute Indians which would enable us to uphold the opinion of the Indian Claims Commission. Rather, the government has successfully shown that the Commission's opinion must be reversed. The 1950 settlement (117 Ct. Cl. 433, 436) is applicable, because the lands at bar were included in that case. The appellees are absolutely bound and barred by the 1950 case; the doctrine of *res judicata* cuts them off. Any other conclusion would be a violation of the Supreme Court's holding in *United States* v. *Wm. Cramp & Sons Co.*, 206 U.S. 118, 128 (1907), where the Court said:

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. * * * [*Id.* at 128.]

The language of the 1950 stipulation is even clearer, more all inclusive, and more final than that quoted by the Supreme Court. It says that the judgment entered in that case is *res judicata*, "not only as to the land described in Schedule 1, but, * * * also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and * * * disposed of as free homesteads * * *." To tie up all the loose ends, this court in 1950 went even farther, and said "* * * The petition of plaintiffs herein shall be deemed amended to conform to this stipulation." [*Id.* at 437.] The comprehensive terms of the stipulation for judgment in case No. 46640 show an intent to clean up and close up every claim arising out of the government's dealings with the Ute Indians and their former Colorado Reservation land. There is no manifestation of an intent to reserve any claim. Appellees' present claim falls squarely within the four corners of the 1950 settlement, and has therefore already been settled, paid, and extinguished.

And, the tribe is further bound because of the concession it made in this 1950 stipulation. The stipulation, accepted by this court and the parties to the suit, read "The plaintiffs concede that due and proper accounting has been made by

the defendant to the plaintiffs for those lands sold for cash during the period from June 30, 1910, to June 28, 1938." At the time this concession was made, the GAO Report for case No. 46640 had been mailed to the attorneys for the Southern Utes. This report (Def's Ex. No. 21) included sales from the Southern Ute portion of the 1880 cession under the act of 1895. The Tribe conceded that this accounting was due and proper. (Sales from the Southern Ute portion of the 1880 Cession up to 1910 were accounted for in case No. 30360 (45 Ct. Cl. 440 (1910))).

The Indian Claims Commission dismissed this crucial factor, saying that the amounts included were merely errors on the part of all concerned. These "errors" amounted to $215,989.95 paid under section 3 of the Act of 1880, and $215,977.58 paid under section 5 of the Act of 1895. The true error here was made by the Commission in not recognizing the true nature of this former compromise and settlement of appellees' claims.

One additional point should be raised regarding the effect of case No. 46640. This court ordered the case remanded to the Indian Claims Commission in 1967 with instructions to hear additional evidence on the intention of the parties signing the stipulation. The only testimony taken at the rehearing was that of Dr. Ernest L. Wilkinson, signatory to the stipulation in case No. 46640, and of Georgette Betor Lee Hall, who took part in preparing Schedule 1. The government took the position that the stipulation spoke for itself, and that the parties' intentions should be determined from the four corners of the instrument. Further, the government produced no documents, contending that all such requested material was the work product of the attorneys for the Department of Justice, and, therefore, privileged information protected by order of the Attorney General. Not surprisingly, Dr. Wilkinson, attorney for the appellees, testified that it was not his intention to include any of the lands presently at bar in the 1950 stipulation. It is appropriate to point out that if he had said anything else, he would have made himself ridiculous in that any other statement would have contradicted appellees' brief and his own law firm's position in this case. No weight can be given to these additional findings

of fact. And a case of this magnitude cannot be decided because of a disagreement by the court with the government's policy of nondisclosure of work products. The Commission concluded that:

> * * * [I]t was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the government * * *. [21 Ind. Cl. Comm. 268, 275 (1959).]

This additional evidence is therefore factually insufficient; it is also legally insufficient. This is due to the well-settled doctrine that parol evidence cannot be admitted in collateral proceedings to vary or explain judgments or judicial records. A stipulation such as was entered in No. 46640 is an act of the court and has the same force and effect as all judgments. *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261 (1885); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Mason* v. *United States*, 144 Ct. Cl. 579, 169 F. Supp. 507 (1959).

The reason for and importance of this doctrine was set out by this court in an earlier case, *Utah Power & Light Co.* v. *United States*, 70 Ct. Cl. 391 (1930):

> * * * If, by reason of the decree having been entered by consent, the judgment which forms part of it is not in fact an adjudication of the issues in the case in accordance with its recitals, then in all the numerous cases in which final decrees have been entered by Federal courts [on stipulation] in accordance with the agreement between counsel for the Government and counsel for the other party to the action, the decree is not binding upon the parties and becomes of no force and effect. The establishment of such a doctrine, * * *, would not only surprise the legal profession generally, but render a final settlement of cases pending in courts practically impossible. [*Id.* at 397–98.]

The case should never have been remanded to the Commission for this purpose and I regret that I did not dissent from the decision to do so. This remand was an open invitiation for a collateral attack on our 1950 judgment, which is not permissible and made it appear that our court did not know what it was doing when it entered the 1950 judgment settling,

compromising, and paying all of appellees' claims of every kind and character regarding all of its lands ceded to the United States in 1880, which included the land in suit.

But, says the majority, the Indians[1] should still recover, on the theory, itself quite anomalous, that the Act of 1880 was somewhat ambiguous, and, therefore, the subsequent governmental acts and Acts of Congress can be looked to to determine ownership of the lands in question. This argument is not only a contradiction of the facts and circumstances of this case, but also violates the principle of *stare decisis*.

Primarily, the Act of 1880 is not ambiguous. Its terms clearly indicate that the title to all lands embraced by the Act, and not allotted to the indivdual Indians, is released and conveyed to the United States. The surplus land involved in this case, land remaining after allotments to individual Southern Utes were made, was, therefore, not the property of the Indians, but of the United States. As we have stated earlier, the language in case No. 46640, " * * * any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 * * *," is *descriptive* language. The court in 1950 had no other convenient method of describing the land, so reference was made to it in the best terms available, namely, as all land included in the Act of 1880. Since the lands at bar were not allotted to individual Indians in accordance with the 1880 Act, title to them was therefore released and conveyed to the United States. Therefore, the lands at bar fell squarely within the stiplation in case No. 46640.

This being the case, the subsequent acts of the government are without legal effect as far as the facts of this case go. Two reasons make this conclusion mandatory. First, assuming for the sake of argument that governmental acts subsequent to 1880 were confusing, *still* the lands in question were conveyed to the United States by the Act of 1880. Second, a correct reading of the Acts of 1882 and 1895 show that these Acts made absolutely no change in the Act of 1880. I have

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[1] A judgment in this case will doubtless reach into the millions, as did the judgments in 1950. The current population of the Southern Ute Tribe is around 660. (Dept. of Interior, Bureau of Ind. Aff.; "Estimate of the Indian Population Served by the Bureau of Indian Affairs; 1968".)

already explained these Acts, and will not repeat myself. Suffice it to say that there are no words of cession or reservation in these later Acts (as regards the land at bar), and, therefore, title remained in the government in accordance with the Act of 1880, and did not go to the Southern Utes. The Indians' supposititious belief that they owned the land is of no legal importance, and it is surprising that the majority would believe Ute Indian Buckskin Charlie instead of the Congress of the United States. This is not a contract case where detrimental reliance comes to play; nor, for that matter, have the Indians suffered to their detriment by mistakenly believing they were the owners of the land they ceded away. And, any subsequent confusion on the behalf of changing government officials does not and cannot change the binding legal effect of the Act of 1880. Rather, it only goes to show that the Indians' stalling tactics were partially effective, and that time dulls the inattentive senses of changing governmental officials as well as of Indians.

The majority places weight on the fact that the Act of 1895 was negotiated solely with the Southern Utes. Fifteen years had then elapsed since the 1880 agreement, and the government desperately needed to get this matter settled. Therefore, it used what means it deemed expedient to convince the Southern Utes to take allotments, or move to the site of the present Ute Mountain Reservation. This meant negotiating directly with the Southern Utes, and paying the proceeds of the land held in trust directly to them. This was a mere gratuitous windfall to the Southern Utes, and any harm done here was to other tribes of the Confederated Bands of Utes. Furthermore, even if we accept for the sake of argument the majority's position, nothing done in 1895 took the lands presently in question out of the *descriptive phrase "lands ceded in 1880."* Even if the majority's position regarding the Act of 1895 is true, the lands at bar were still within the terms of the stipulation, since they were originally part of the lands ceded in 1880, and, therefore, any claims pertaining to these lands have been disposed of and settled.

To document the fact that the lands presently before us were indeed ceded by the Indians to the government in 1880, we need only pay heed to the doctrine of *stare decisis*, and examine earlier cases decided by this court which dealt with

and interpreted the Act of 1880. Each of these cases involved the Act of 1880, and what lands were embraced therein, and in each case the question of what lands were involved in the Act of 1880 was clearly before the court for decision.

The first case to arise out of the Act of 1880 is *The Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910). This was an accounting case for the proceeds of all cash sales of land ceded by the Indians to the United States under the Act of 1880, up to 1910. The printed record of the case (Def's Ex. 14a and 14b) establishes beyond a doubt that lands from Royce Area 617 (the lands presently before the court) and Royce Area 616 were included in the final judgment of this case, since these lands were within the 1880 cession to the government. In the Memorandum in re the *Confederated Bands of Indians* v. *United States*, Cause No. 30360, at page 634 (Def's Ex. 14a), the following excerpt is right to the point:

> The area of lands sold during the fiscal year 1908, as first stated, was 112,158.94 acres, while the cash received therefor is $90,219.93. (Record p. 355.) The explanation is that part of this land has been sold under the Act approved February 20, 1895 (28 Stats., 677), [i.e., opened under the homestead laws] being surplus lands on the Southern Ute Reservation, partly on deferred payments. *These lands are embraced within the cession of 1880 and within the accounting under the jurisdictional act.* [Emphasis supplied.]

In the opinion of the court in the case, Judge Barney wrote:

> In compliance with the provisions of the act [of 1880] all of the plaintiffs were removed to Utah, and allotments were there made to them, except the southern Utes who remained upon the reservation [of 1868] and received allotments along and within its southern border and partly within New Mexico. * * *. [*Id.* at 461.]

The Judge also wrote:

> By that agreement [of 1880] the plaintiffs ceded to the United States *the entire remainder of their reservation* * * * and agreed to remove, settle upon, and accept individual allotments of unoccupied agricultural and grazing lands in *certain designated localities* * * *.
>
> It was further agreed by section 3 of said act that *all lands within the ceded limits not allotted in severalty* to the plaintiffs should be *deemed to be public lands of the*

United States * * *. [Emphasis supplied.] [Id. at 459–60.]

Also included in this 1910 case was an accounting for land taken for the San Juan National Forest. This land was within Royce Area 617, the land area presently before the court, and was held by the court in 1910 to be land embraced by the cession of 1880.

Appellees have failed to distinguish this case, or to show that an error was made by the court in 1910. The majority's opinion likewise fails to follow this case, or to deal with it.

The next case involving the Act of 1880 to come up was *Confederated Band of Ute Indians* v. *United States*, 100 Ct. Cl. 413 (1943), which dealt with the remaining undisposed of lands in Royce Area 616; therefore, the Act of 1880 was again before the court. This case arose after the 1938 "restorations." (By way of explanation, in 1938 by Act of Congress, the remaining undisposed of lands in Royce Area 616 were declared to be the property of the United States, while the remaining lands in Royce Area 617 were restored to tribal ownership.)

In the Reporter's Statement of the Case, we find the following:

> By the agreement ratified, confirmed, and amended in the Act of June 15, 1880, which was in turn accepted and ratified by plaintiffs, plaintiffs *ceded to defendant all territory* in Colorado then reserved for their use, *after the allotment* of certain lands to individual members of plaintiff bands as provided by said agreement. * * * [*Id.* at 416.] [Emphasis supplied.]

This is a correct interpretation of the Act of 1880.

The Reporter also set out the terms of the restoration of Royce Area 617:

> * * * [T]he Secretary of the Interior purported to restore certain lands in the southern portion of the area ceded in the Agreement of 1880 to the "Ute Mountain Band of Ute Indians of the Southern Ute Indian Reservation in Colorado," and to the "Confederated Bands of the Ute Tribe of Indians, Colorado," respectively. [*Id.* at 419.]

The fact that the land was *restored* to Southern Utes and other tribes of the Confederated Bands is convincing evidence

that the Southern Utes did not retain ownership of these lands, because you cannot restore land if it was never ceded away.

Judge Madden, writing for the majority, construed the Act of 1880:

> On March 6, 1880, an agreement was made by the chiefs and headmen of the Utes, which was later ratified by the members of the tribes, *to cede their remaining lands in Colorado to the United States*, after first providing for certain individual allotments to some members of the tribes. * * * [Emphasis supplied.] [*Id.* at 421.]

Here is another clear holding by this court that the lands presently in question were a part of the lands ceded by the Indians to the government in 1880.

In 1948, the court heard a suit to determine which lands were taken and the value thereof within the terms of the 1945 judgment. *Confederated Bands of Ute Indians* v. *United States*, 112 Ct. Cl. 123 (1948). The court accepted the 1948 construction of the Act of 1880. The Indians have failed to distinguish this case.

The next litigation involving the Act of 1880 is the 1950 case, *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950), in which four causes (Nos. 45585, 46640, 47564, 47566) were settled. It is of course my contention that cause No. 46640 settled the claims on which the Indians are presently suing.

Soon after the 1950 case, the court heard a suit for attorneys' fees for services rendered to the Confederated Bands which resulted in the 1950 decision. *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951). The very law firm which is now in court representing the Southern Utes in this case was bringing suit to determine the value of its services. Findings of Fact No. 25(b) from that case is another answer to the case before us, and, I would suggest, an answer to which plaintiffs now before us are specially bound. The court found:

> 25. (a) * * *
>
> (b) The original Ute reservation, established by treaty between the Indians and the United States in 1868, embraced 15,000,000 acres on the western slope of Colorado. In 1873 the Indians ceded to the United States

a segment in the southern part of the reservation containing 3,000,000 acres. *In 1880 the Indians ceded to the United States the remainder of the reservation, containing 12,000,000 acres.* [Emphasis supplied.] [*Id.* at 623.]

In every single case which has come before this court involving the Act of 1880, this court has found that the Act ceded to the United States *all* of the lands in the former Ute Reservation in Colorado, excepting only the land transferred to individual Indians as allotments. The majority ignores these cases as if they were not in the books. In its zeal to compensate the living Indians for the claimed harm done their ancestors, the majority loses sight of the fact that the Indians have already been amply reimbursed for the land at bar in 1950. The Southern Utes may have sincerely believed that this land was theirs, but Indians too can be wrong. In another case in which the Utes were plaintiffs (involving different land), the Supreme Court set out the long established rule governing the interpretation of treaties, acts, and agreements between the Indians and the United States:

> * * * While it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. *Choctaw Nation* v. *United States*, 318 U.S. 423, 431–432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so. Solicitous as the Government is to carry out its promises to the Indians in good faith, we are satisfied from this record that the Government has performed all that it promised. [*Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 179–80 (1947), *aff'g*, 106 Ct. Cl. 33, 64 F. Supp. 569 (1946).]

I am satisfied that in the case before us the government has performed all it promised and has already paid the Indians for their present claim.

It should be pointed out that when the four cases (Nos. 45585, 46640, 47564 and 47566) were settled in *Confederated Band of Ute Indians* v. *United States*, 117 Ct. Cl. 433 in 1950, the settlement was one of pure compromise of all the claims of the Ute Indians. The agreement of settlement was not

reached quickly. In fact, negotiations for compromise and settlement extended over a period of three years. The government first offered the sum of $14,000,000, plus interest, less offsets, in full settlement. This was refused by the Utes. The government then offered $20,000,000, including interest, less offsets, which was refused.

The Utes' attorneys demanded $30,000,000 in settlement of all the claims and cases. Finally, the parties agreed to a compromise settlement of $20,000,000, plus interest, amounting in all to the sum of $31,938,473.43. This amounted to $15,600 for each Indian. The parties then entered into a joint stipulation and judgment of compromise and settlement of all claims and demands, right, title, interest, and estate of whatsoever nature in and to the land in western Colorado ceded by the Ute Indians to the United States by the Act of June 15, 1880. All of these negotiations are shown in the opinion of this court in the case of *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609 (1951) in which the attorneys were asking this court to allow them an attorney fee of $3,193,847.35.[2] They alleged in great detail all the work they had done, which was considerable, how they had negotiated for the compromise and settlement and how long it took to reach a settlement agreement. The significance of all of this is to show that the settlement was a lump sum compromise in the nature of a jury verdict for *all* the claims of the Ute Indians with reference to the land ceded in 1880 (including the land involved here). It did not matter what land was listed in Schedule 1, nor whether or not all of it was listed, nor whether the listing was correct. The Indians make a great deal to do over their claim in this case that no land in Royce 617 was listed in the Schedule. This is immaterial, because the stipulation of the parties and judgment stated it was in *full* settlement and payment for the *complete extinguishment* of plaintiffs' claims *of whatsoever nature* in and to the lands ceded in 1880, *whether listed in Schedule 1 or not*, and plaintiffs' petition was deemed amended to conform to the stipulation.

The Indians and their attorneys are estopped to attack or impeach their own stipulation and judgment which they

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[2] The sum of $2,800,000 was allowed.

signed and accepted and for which they have been paid. *Davis v. Wakelee*, 156 U.S. 680, 689-90 (1895); *Livesay Industries, Inc. v. Livesay Window Co.*, 202 F. 2d 378, 382 (5th Cir. 1953), *cert. denied*, 346 U.S. 855; *American Nat'l Bank & Trust Co. v. Taussig*, 255 F. 2d 765, 769 (7th Cir. 1958), *cert. denied*, 358 U.S. 883. This settlement was payment for, and an accord and satisfaction and release of, all of their claims, including those before us in the instant suit. I mention the attorneys because this court must fix their attorney fees, as it did in the previous case, as an amount not exceeding 10 percent of the recovery. They shared in the previous recovery on a contingent fee basis and will share in this one on the same basis. I consider that under the circumstances they are bound by the stipulation, settlement, and judgment in 1950 to the same extent that the Indians are bound.

Lack of Necessary Parties Plaintiff

There is another fatal flaw in the Indians' side of the case before us, a flaw which requires a reversal of the decision in this case. This is because there is a lack of necessary parties before the court.

First, it should be observed that any claim that the White River, Uncompahgre or Uintah Utes might have had was lost in the following Resolution of June 1, 1950. (Def's Ex. 18. This resolution was accepted by Congress and carried into effect by section 2 of the Act of August 31, 1951, 65 Stat. 194.)

(3) * * * [T]hat the Southern Ute Band (including the Ute Mountain Utes) shall forever possess and own their Reservation [this included the Ute Reservation established west of Range 13 by the Act of 1895 and the residue lands (unallotted, unsold and not taken for the San Juan National Forest) east of range 14 which were restored to tribal ownership by order of the Secretary of the Interior of September 14, 1938] free from any claim of the Ute Indian Tribe of the Uintah and Ouray Reservation * * *.

(4) * * * [T]hat neither the Southern Utes (including the Ute Mountain Utes) nor the Uncompahgre, White River or Uintah Utes shall have any claim against each other for the past distribution of funds or allocations of land; * * *.

The fatal lack of parties, however, involves the various original signatories to the Agreement of 1895. The Southern Utes before the court cannot recover, because the present day Ute Mountain Utes, who are a part of the Southern Ute Tribe, are not parties to the suit.

At the time of the passage of the Act of 1895, there were three bands known collectively as the Southern Utes; the Muaches (or Moaches), the Capotes and the Weeminuches. As I have said above, by the Act of 1895, one group of Indians chose to move to a reservation in western Colorado and New Mexico, and the other Indians chose to take individual allotments in the eastern portion of Royce Area 617. The group refusing allotments, which moved to the new western reservation, was composed mainly of Weeminuches (see appellees' brief at 13–14), and became known as the Ute Mountain Tribe, and were officially so recognized in 1940. The individual Indians who took allotments in the east were mainly Capotes and Muaches and are the appellees now before the court.

The Act of 1880 moved the Capotes, the Muaches and the Weeminuches (under the collective name of the Southern Utes) to the land area now in question for the purpose of taking allotments. Then, in 1895, some moved to the site of the present Ute Mountain Reservation in the west and some took allotments in the east. (It should be noted that the appellee Southern Ute Tribe had no official reservation until 1938, when the residue of unsold and unallotted lands in Royce Area 617 was restored to tribal ownership by order of the Secretary of the Interior. Prior to 1938, the only possessory interest any of these Southern Utes held in any land was their individual interest in their individual allotments.)

Under section 5 of the Act of 1895, all of the bands of the Southern Utes, including the present day Ute Mountain tribe and the appellees, shared in the special benefits from the lands to be sold after the allotments. (See 28 Stat. 677, 678.) The Act even specifically set aside, out of the first moneys realized, an amount to be paid to "Buckskin Charlie, as chief of the Moaches, and *Mariano, as chief of the Weeminuches*, [who was of the Ute Mountain tribe] * * * [and] to Tapucke and Tabewatch, as chiefs of the Capotes * * *."

It is perfectly clear that the only property granted appellees' ancestors were the allotments, and the only property granted the ancestors of the present Ute Mountain Tribe was the land which is now the Ute Mountain Reservation. And the right to the proceeds from the remaining lands sold (the basis of this case) was granted to *all* of the Southern Utes (ancestors of the present Southern Ute Tribe and Ute Mountain Tribe) by the Act of 1895. Therefore, the Ute Mountain Tribe, not a party to this suit, has an interest in every claim arising from this land. Appellees' failure to join them results in a fatal lack of necessary parties.

In their brief, appellees attempt to deal with this serious problem within the space of three paragraphs (see brief at 13–14). To put it mildly, the reasoning and statements set forth are pure fantasy. Appellees say that the Act of 1895 was, "In effect, * * * a cross-relinquishment of rights between the allotted and unallotted Southern Utes * * *." This is simply wishful thinking, and is plainly contradicted by the specific terms of the Act of 1895, which gives the benefits and proceeds from the Act to *all* Southern Utes, both allotted and unallotted. There is neither in effect, nor in fact, nor in law any such "cross-relinquishment" of rights. The brief then says that "the unallotted Southern Utes surrendered their interest in the eastern portion of 'their present reservation' and the allotted Southern Utes surrendered their interest in the western portion." This again is simply fantasy. The Act of 1895 reserves the rights of *all* Southern Utes (Weeminuches, Capotes and Muaches, or, present day Ute Mountain Tribe and Southern Ute Tribe) to the proceeds of the sale of remaining lands.

Appellees then say, "The Southern Utes accepted this separation and two land-owning groups, each with its own reservation, were created. Through the voluntary cross-relinquishment of their interests under appropriate legislation, the allotted Southern Utes became the sole owners of the eastern part of the Southern Ute Reservation." (Brief at 14.) First, two land-owning groups, each with its own reservation, were *not* created. The only interest the allotted Indians held in the land was in each individual allotment. No reservation in the eastern part of Royce Area 617 was created; to the

contrary, only individual allotments were created. Second, neither through a hypothetical "cross-relinquishment," nor through "appropriate legislation" (it is interesting to note that we are not cited to any of this "appropriate legislation"), did the present day Southern Utes become sole owners of the eastern part of Royce Area 617. To the exact contrary, the present day Southern Utes became owners only of individual allotments, and the remaining land was held by the government, with the proceeds to go to all of the Indians, Weeminuches, Capotes and Muaches, regardless of whether they lived on the new Ute Mountain Reservation, or on an allotment.

I do not agree with the hindsight approach of the majority to this problem by its reliance on and interpretation of Rule 62(a) of this court. This rule applies only to suits originally filed in this court. The case before us is not such a case, but is one that was filed originally with the Indian Claims Commission, which has its own rules, and we are hearing the case on appeal. Not only that, but this court has its own separate rules for Indian cases it hears on appeal, adopted in 1948, entitled "Rules of the Court of Claims of the United States Governing Appeals From the Indian Claims Commission." Consequently, Rule 62(a) does not apply. In any event, the interpretation of this rule by the majority renders it meaningless. They say, in effect, that the rule means that an outside third party who may not even know the suit is pending, must affirmatively and timely intervene (file a claim) and, if he does not do so, the rule is satisfied. This is not what the rule says. It states in unequivocal language:

> * * * [P]ersons having a joint interest adverse to the United States, *shall be made parties* and *shall be joined* on the same side as plaintiffs. When any person who should join as a plaintiff refuses to do so, he may be made an involuntary plaintiff. [Emphasis supplied.]

As may be seen, this rule provides that persons having an interest "shall" be made parties and "shall" be joined as plaintiffs. This is compulsory and not optional. Also, the rule, where it is applicable, contemplates that persons having an interest *at the time the suit is filed* shall be joined. This suit was filed August 10, 1951, at a time when the Ute Mountain

Indians of the Southern Ute Tribe unquestionably had an interest in the claim. Under Rule 62(a), if it applies, they should have been made parties by the appellees at that time, and because of the failure to do so by appellees, there was and is a fatal lack of necessary parties in this case. But, the majority, with its hindshight approach is applying the rule as of now, 18 years after the suit was filed, saying, in effect, it would do no good to make them parties now because limitations has run on their claim, and, therefore, Rule 62(a) is satisfied and the present plaintiffs, notwithstanding their failure to comply with the rule, is in the position of "winner take all," including the interest of the Ute Mountain Indians. I cannot agree with this interpretation of the rule.

But, the problem does not end here. The Commission itself said that if the Utes ceded their entire Colorado Reservation in 1880, "then the present day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties." [3] Of course, as shown by the foregoing, this is exactly what happened. The Utes did cede all their remaining reservation to the United States in 1880. Therefore, the Ute Mountain Utes were necessary parties.

There is another reason not mentioned by the government why the Ute Mountain Utes are necessary parties to this suit. I refer to the fact that this suit was filed by the Southern Ute Tribe or Band of Indians. There is no question but what the Ute Mountain Utes, who live in the west, are as much a part of the Southern Ute Tribe or Band of Indians as the other Indians who live in the east (of Royce 617). I see nothing to prevent the Ute Mountain Utes from suing the United States, after payment of the judgment being awarded to the present appellees by the Commission and by the majority in this case, on the theory that since they are a part of the Southern Ute Tribe or Band of Indians, this suit was maintained for their benefit and the government has paid their part of the recovery to the wrong parties, namely, the Southern Utes who live in the eastern part of Royce 617. In that case, the government would have the obligation of paying the claims for this land not only twice, but *three* times. The situation finally gets ridiculous. This problem is not cured by the al-

[3] 17 Ind. Cl. Comm. 28, 52.

legations and contentions of the present plaintiffs to the effect that they are the sole owners of the claim, because the Ute Mountain Indians of the Southern Ute Tribe have had no notice of this suit and could not be bound by allegations of the plaintiffs unknown to them. They could, with sound reason, dispute this claim of the present plaintiffs and would no doubt do so if they had notice of this suit and were parties to it.

As late as 1951, the Congress considered the Ute Mountain Utes to be a part of the Southern Ute Band as shown by the resolution carried into effect by section (3) of the Act of August 31, 1951, 65 Stat. 194, quoted above, which contained the provisions "(3) * * * [T]he Southern Ute Band (*including the Ute Mountain Utes*)" and again in section (4): "* * * [T]he Southern Utes (*including the Ute Mountain Utes*)." [Emphasis supplied.] There is no question but what the Ute Mountain Utes were as much a part of the Southern Ute Tribe as were the present appellee Indians, and they were necessary parties to this lawsuit. It is difficult to see how one could reach a different conclusion.

The appellees have completely failed to sustain their contention that they are the sole owners of the claims in suit. Perhaps it is natural that they have failed in this respect, because it would have been impossible for them to prove otherwise, since in reality they are not the sole owners of the claims in suit.

The claim stated in the appellees' petition, filed August 10, 1951 (before the expiration of the Indian Claims Commission Act), sought an accounting for:

> c. Defendant's failure to account for the proceeds from approximately 81,953.18 acres * * * was in violation of the aforesaid statutes [of 1880 and 1895] * * * and caused damage to petitioner in an amount equal to that received by defendant, which amount is unknown to petitioner, but is known to defendant.
>
> d. Defendant's failure to account for the proceeds from the sale of approximately 81,953.18 acres constituted unfair and dishonorable conduct on the part of defendant, and caused damage to petitioner in an amount equal to that received by defendant * * *.

As this is no more than a claim for proceeds from sales, this claim has already been settled by the stipulation case No. 46640 (117 Ct. Cl. 433, 436 (1950)).

The additional accounting claims, which deal principally with mismanagement of trust funds (see Def's brief at 81–86 for complete listing), were inserted in the case in 1963 by way of filing exceptions. This was long after the 1951 expiration date of the Indian Claims Commission Act (25 U.S.C. § 70k). When the tribe presented these additional claims, defendant objected strenuously that the claims were beyond the scope of the initial claim, and, therefore, their admission was violative of the Supreme Court's ruling in *United States* v. *Seminole Nation*, 299 U.S. 417 (1937), wherein the court said that after the time allowed in a jurisdictional act has run out, amendments may only supply details, but may not bring in additional claims. (This holding followed in *Seminole Nation* v. *United States*, 316 U.S. 286, 288–89 (1942).) The claims filed in this suit in 1963 are obviously beyond the scope of the original claim filed in 1951.

The Commission seems to concede that the new claims asserted went beyond the original claim, when it said:

> Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its petition for certain specific items and has now raised by means of the exceptions * * * certain general accounting claims not referred to in its petition. [17 Ind. Cl. Comm. 28 (1966).]

But the Commission attempts to get around this by applying a rule sounding in equity, that the tribe did not know how its funds had been mishandled within the time allowed, and that this knowledge came to light only after the appellees received the GAO report in the case. Even if this statement was factually correct, it could not extend the jurisdiction of the Commission, for the enabling Act reads:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. [25 U.S.C. § 70k (1964).]

But further, the evidence in this case shows that GAO reports covering the handling of the funds had been submitted to the Utes' counsel as early as June 1949 (report in case No. 46640), and February 1953. Although the latter GAO report, the report in this case, was submitted in 1953, it was not until

1963 that counsel for the Southern Utes filed these exceptions. Not only was the late filing barred by limitations due to the Indian Claims Commission Act quoted above, it was also barred by the equitable doctrine of laches.

Conclusion

In my opinion, in accordance with section 20 of the Act creating the Indian Claims Commission (25 U.S.C. § 70s(b) (1964)), I would hold that the findings of fact of the Indian Claims Commission in this case are not supported by substantial evidence, and especially its findings that the Confederated Bands of Ute Indians did not cede their remaining lands in their Reservation to the United States in 1880; that the Ute Mountain Utes in the west of Royce 617 are separate from the Southern Ute Tribe in the east; that the lands involved in this case were not included in the settlement of 1950 and that the parties did not so intend; that a proper accounting has not been made by the government to the appellees. I would also hold that the conclusions of law stated by the Commission as a basis for its final determination are not valid and are not supported by its findings of fact for all of the reasons stated herein. This is particularly true with reference to its conclusions of law that the Ute Indians did not cede all their remaining lands to the United States by the Act of 1880; that the subsequent Acts of 1882, 1888, and 1895 restored and vested the lands involved here in the Southern Utes in the eastern part of Royce 617 and to the exclusion of the Ute Mountain Utes; that said lands were not included in the 1950 settlement and the appellee is now entitled to be paid for it; that *res judicata* does not apply and that the Ute Mountain Utes are not a part of the Southern Ute Tribe and consequently have no claim and are not necessary parties.

Both the majority and the Commission ignored and ruled contrary to the following well-established principles of law in allowing the plaintiff Indians to recover in this case:

1. *Res judicata.*
2. *Stare decisis.*
3. Compromise and settlement.
4. Payment.
5. Accord and satisfaction.

6. Release of all claims.
7. Collateral attack on the 1950 judgment.
8. Disregarding the 1950 judgment of this court when no direct attack has been made on it.
9. Estoppel of the Indians to impeach their own act in executing the stipulation, settlement, and judgment of 1950.
10. Varying the terms of the written stipulation and judgment of 1950 by the parol evidence of Attorney Wilkinson 19 years later as to his intention.
11. Lack of necessary parties plaintiff.
12. Limitations and lack of jurisdiction as to the accounting claim.
13. Lack of substantial evidence.
14. Erroneous conclusions of law.

Seldom do you find a case where so many bulwark principles of law have been ignored, by-passed, and violated. In my opinion, the decision should not stand.

I would reverse the decision of the Commission and enter judgment for the defendant.

COWEN, *Chief Judge*, dissenting:

Although I cannot join in a number of the observations made in his dissenting opinion, I am persuaded that Judge Skelton has accurately analyzed the purpose and effect of the Act of 1880 and subsequent acts involved in this appeal and has correctly concluded that appellee's right to recover is precluded by the judgments entered by this court in 1950 in the four cases (Nos. 45585, 46640, 47564, and 47566), *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950).

I also agree with Judge Skelton that this court erred in remanding the case to the Indian Claims Commission to determine the intention of the parties in executing the stipulation on which the judgment in Case No. 46640 was based. If such a collateral attack on the judgment entered in that case were permissible, I would readily concur with the court's holding that the proceedings before and the additional findings made by the Indian Claims Commission on remand, support the conclusion that the parties never intended that the stipulation included Royce Area 617. However, as clearly established by the authorities cited by Judge Skelton, the stipulation was the basis for the entry of a final judgment which may not be re-opened or examined in such a

collateral proceeding to ascertain the intent of the stipulating parties. Although our error—an error in which I participated—in remanding the case for that purpose is regrettable, it is not too late to acknowledge the error and to correct it.

I think it is much too late in the history of the Ute Indian litigation in this court to raise any doubt about the fact that the land, which is the subject of this appeal, was ceded to the United States by the Act of 1880. This court so found in each of its decisions discussed in Judge Skelton's opinion and the Supreme Court so construed the Act in *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169 (1947), wherein the Court stated:

> There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. On the contrary, the Act embodied a transaction whereby the Indians were the transferors and conveyed lands to the Government. For the value of lands so conveyed, and for no other, the Government was to make an account to the Indians after certain deductions had been made. [330 U.S. at p. 177].

Moreover, the plaintiffs in the four suits (Nos. 45585, 46640, 47564, and 47566), filed pursuant to the Jurisdictional Act of June 28, 1938, 52 Stat. 1209, alleged that the land had been ceded to the United States. For example, paragraph 5 of plaintiff's petition in Case No. 46640 reads as follows:

> By agreement of March 6, 1880, which was amended, ratified and confirmed by Act of Congress of June 15, 1880, c. 223, 21 Stat. 199, 1 Kappler 180 (amended by Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205), plaintiffs ceded to defendant a vast area of land in exchange for which defendant among other considerations agreed, after the allotment of certain lands to individual members of plaintiffs, to hold the balance of such lands in trust for cash entry (and not entry or settlement under the homestead laws), and to deposit the proceeds received from such sales, after certain stipulated payments, in the Treasury of the United States for the benefit of plaintiffs. The Agreement of March 6, 1880, as amended by the aforesaid Act of June 15, 1880, was ratified and approved by three-fourths of the adult male Indians of the Confederated Bands of Utes within the time limit fixed by Section 10 of said Act.[1]

[1] *See* Vol. 960, Printed Records, Court of Claims Term 1949.

Furthermore, it is not open to question that the Jurisdictional Act of June 28, 1938, pursuant to which the four suits settled in 1950 were filed, was intended to confer jurisdiction on this court to hear, determine and render judgment on all remaining claims, legal and equitable, which the Indians then had against the United States, whether the claims arose under the Act of 1880 or subsequent acts. The first section of the Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred on the United States Court of Claims to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent [sic] band thereof, may have against the United States, including, but without limiting the generality of the foregoing, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, Executive order, or by reason of any lands taken from them, without compensation, or for the failure or refusal of the United States to protect the interest of any of said bands in lands (as to which any of said bands had the possessory right of use and occupancy), or because of any mismanagement or wrongful handling of any of the funds, land, property, or business enterprises belonging to or held in trust for any of said bands by the United States, or any misfeasance or nonfeasance on the part of the United States with respect thereto, or otherwise.

I find nothing in the foregoing or elsewhere in the Act which suggests that the claim involved in this appeal was somehow reserved or excluded from the terms of the statute.

The Indian Claims Commission found that appellee is entitled to recover for the taking of 230,547.44 acres of land disposed of by defendant as free homesteads between 1899 and September 14, 1938, for interest due on the proceeds of the sales of appellee's land, and for an accounting as to the use of such proceeds.[2]

Plaintiff's petition in Case No. 45585 (the first of the four suits brought pursuant to the Act of June 28, 1938, and settled in 1950) was filed November 22, 1941, and plaintiff's petition in No. 46640 was filed October 15, 1945. Prior to the time these suits were filed in the Court of Claims, the causes

[2] 17 Ind. Cl. Comm. 28, findings 10, 11, 19 and 20.

of action, upon which the Commission predicated defendant's liability to the appellee, had accrued and could have been included in the four suits. Moreover, the allegations of plaintiff's petition in Case No. 46640 were broad enough to include the claims for which the Commission held the defendant liable. In the amended petition filed in that case on March 19, 1947, plaintiffs alleged the following in paragraphs 6 and 7:[8]

6. By decree of this Court in a suit brought by plaintiffs in 1909 (The Ute Indians v. The United States, No. 30360), pursuant to a jurisdictional act of March 3, 1909, c. 263, 35 Stat. 781, 788, plaintiffs recovered judgment against defendant for the proceeds of certain sales and other disposals of the aforesaid lands up to June 30, 1910. No relief is sought with respect to such sales and dispositions in this action, but relief is sought with respect thereto in Case No. 47566, filed in this Court on December 30, 1946.

By Executive Orders of December 6, 1916 and September 27, 1924, defendant withdrew and set aside 64,560 other acres of the aforesaid lands as naval oil reserves which lands are the subject matter of Case No. 47564, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

By Agreement of May 10, 1911, amended, ratified and confirmed by Act of June 30, 1913 (38 Stat. 77, 81-82), defendant conveyed 20,160 other acres of land subject to the aforesaid 1880 Agreement, together with other lands to the Weeminuche or Southern Ute Indians in partial exchange for lands from the then reservation of said Indians. Such lands are the subject of plaintiffs' claim in Case No. 47565, filed in this Court on December 30, 1946, and no relief is sought therefor in this action.

Since June 30, 1910, and prior to June 28, 1938, defendant made other and further sales and disposals of certain of said lands, by sales thereof for cash, by homestead or other entries under the public land laws for less than the agreed minimum price per acre, by setting apart and reserving such lands as national reservations or for other public uses, or by otherwise classifying, reserving, or withdrawing such lands from entry and sale under the public land laws. Plaintiff is advised, believes, and therefore avers that defendant has not accounted to plaintiffs for such cash sales or paid plaintiffs the minimum per acre price for lands entered under the home-

[8] Plaintiff's amended petition in No. 46640, *The Confederated Bands of Ute Indians v. United States*, Printed Records Court of Claims Term 1949.

stead laws in accordance with the Act of July 28, 1882 (22 Stat. 178) or otherwise, nor paid plaintiffs the value of such lands set apart and reserved as national reservations or classified, reserved, or withdrawn from entry and sale under the public land laws. Defendant has never rendered to plaintiffs a true, complete and proper account with respect to said property of plaintiffs and said trust funds.

7. Wherefore plaintiffs pray that defendant make a full and true discovery and disclosure of acreage sold, homesteaded, or otherwise withdrawn for national reservations or for other public uses, or otherwise classified, reserved, or withdrawn from entry or sale under the Public Land Laws prior to June 28, 1938, and not heretofore paid for by defendant in connection with the suit by plaintiffs brought in 1909 as hereinabove paragraph 6 recited and not the subject of the actions pending in this Court which are referred to in paragraph 6 hereof; and that defendant be adjudged liable to plaintiffs for such sales and appropriations of lands in such amount as upon a complete and accurate accounting this court may find due and owing to the plaintiffs as reasonable and just compensation, but in no event less than the minimum price at which defendant has agreed to sell such lands.

All the judges of the court are agreed that the land now in issue was, in the language of the judgment entered in Case No. 46640, "land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time * * * disposed of as free homesteads * * *." The preceding language of the stipulation—"the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but whether included therein or not"—is certainly sufficient to cover the land now in issue. Therefore, I see no way to avoid the conclusion that the final judgment entered in that case bars appellee's right to recover. The fact that the plaintiffs or their counsel had an undisclosed or unexpressed intention to exclude the land in controversy from the stipulation does not alter the conclusive effect of the judgment entered. *United States* v. *William Cramp Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907); *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961); *Utah Power & Light Co. v. United States*, 70 Ct. Cl. 391, 42 F. 2d 304 (1930).

APPENDIX B

[17 Ind.Cl.Comm. 28, 42]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 328

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
PETITIONER,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: May 6, 1966

Appearances:

John W. Cragun, with whom was Claron C. Spencer, of the firm of Wilkinson, Cragun & Barker, Attorneys for Petitioner

W. Braxton Miller, with whom was Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant

OPINION OF THE COMMISSION

Scott, Associate Commissioner, rendered the opinion of the Commission.

Petitioner herein, the Southern Ute Tribe, a duly organized tribe of Indians with the right to maintain this action has, by petition duly filed, prayed the Commission for judgment against defendant under Clauses 1, 3 and 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049) "* * *" for an amount which will provide fair and just compensation for the approximately 220,495.17 acres of land unlawfully disposed of by defendant, and that defendant be required to render a true, complete and

[43] proper accounting for the proceeds received by it from the disposal of the approximately 81,953.18 acres of land, less any proper credits or setoffs, * * *".

The specific allegations of the petition upon which petitioner relies as a basis for the above prayer are 8e and 8f and the corresponding allegations of damages found in 9a through 9d.

Paragraphs 8e and 9a and 9b concern themselves with the disposal of Free Homesteads, Soldiers' Additional Homesteads, Other Reservations of Land, and Homestead Applications. After a search of the records of the Bureau of Land Management petitioner has increased the acreage alleged to 230,547.44 acres and has dropped the Homestead Application class and the Other Reservations of Land class.

Paragraphs 8f and 9c and 9d concern themselves with certain other types of land disposals and request an accounting for the proceeds therefrom alleged to have been received by defendant.

Defendant relies upon the defenses of *res judicata*, defect of parties, and lack of jurisdiction by the Commission based upon the alleged failure of petitioner to state a cause of action for an accounting for certain funds prior to the expiration of the date for filing claims before this Commission, i.e., August 13, 1951.

Underlying the defense of *res judicata* is the contention of defendant that all of the Colorado Reservation belonging to the Confederated Bands of the Ute Indians was ceded under the Treaty of June 15, 1880. This defense is directed to the proposition of whether or not defendant is liable to petitioner for the disposal of land under the Free Homestead Law [44] instead of by sale to settlers. In order to properly assess this question it is necessary to go into the

background of the relationship between the Ute Indians and defendant.

Under the Treaty of March 2, 1868 (15 Stat. 619) the defendant granted a reservation in Colorado to the Tabequache, Moache, Capote, Weeminuche, Yampa, Grand River and Uintah Bands of Ute Indians.

These bands subsequently became known as the Uncompahgre Utes (Tabequache), the Southern Utes (Moache, Capote, and Weeminuche), the White River Utes (Yampa, Grand River, and Uintah) and the three groups were known as the Confederated Bands of Utes, although there was no formal confederation.

The part of this reservation occupied by the Southern Utes lay along the southern border of the 1868 reservation and is today still designated as the Southern Ute Reservation.

Under the Act of June 15, 1880 (21 Stat. 199) the Confederated Bands of Utes relinquished their lands in trust to the defendant except for certain lands reserved for the Uncompahgre Utes and for the Moache, Capote and Weeminuche Bands, referred to in said Act as the Southern Utes.

The Act of July 28, 1882 (22 Stat. 178) provided for the opening of the lands lately occupied by the Uncompahgre and White River Utes and for the surveying of the line between the land so opened and that occupied by the Southern Utes.

This line established a boundary between the Southern Utes and the lands opened for sale. This created a strip of territory 110 miles long by 15 [45] miles wide. The strip had already been created in fact as a result of the Brunot Cession of 1874 which took a portion of the Ute reservation prior to the Cession of June 15, 1880 (21 Stat. 199). (See Docket No. 327, 11 Ind. Cl. Comm. 180). This 110

mile long area is referred to as Royce Area 617, Colorado.

The Moache and Capote Bands resided in the eastern part and the Weeminuche Band resided in the western part of the area.

By the Act of May 1, 1888, Congress authorized the Secretary of the Interior to appoint a Commission, "* * * with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians * * *".

Although agreement was reached between the Commission and the Southern Utes, Congress declined to ratify it and, instead, passed the Act of February 20, 1895 (28 Stat. 677) which provided that the Treaty of June 15, 1880 be carried out. Section 2 of the Act of 1895 stated that allotments would be made to the Southern Utes "* * * out of the agricultural lands embraced in their present reservation in Colorado * * *", as provided in the Act of June 15, 1880.

Section 3 of the 1895 Act made provision for those Southern Utes who did not take allotments to occupy that part of "* * * their present reservation * * *" which lay west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian and added all of Townships 31 and 32 of Ranges 14, 15 and 16 west of the New Mexico principal meridian and lying in the Territory of New Mexico.

[46] Section 4 provided for the opening of the remainder of the lands by Presidential Proclamation after six months from the passage of the Act, said lands to become thereafter a part of the public domain "* * * and shall be subject to entry under the

desert, homestead, and town site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *".

Section 5 provided for compensation to the Southern Utes and "* * * that the balance of the money realized from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. * * *".

Section 6 stated that the provisions of the Act should take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians then located or residing upon the reservation.

The consent of the Southern Utes was duly obtained and the Moache and Capote Bands accepted allotments in the eastern part of the area and the Weeminuche, declining allotments, remained on the western part, including the area of New Mexico which was added by the 1895 Act. This group is now known as the Ute Mountain Tribe of the Ute Mountain Reservation.

On April 13, 1899 (31 Stat. 1947) the remaining unallotted lands in the eastern part of the area were opened to public entry. That portion of these lands [47] which had not been disposed of was returned to tribal ownership on September 14, 1938.

From the above summary of the background of the relations between petitioner and defendant since the 1880 Agreement, it seems apparent that defendant has by its actions acknowledged the contention of petitioner that the area known as the Southern Ute

Reservation was not ceded by the 1880 Agreement. Defendant's contention that the language of the 1880 Agreement is plain and that it ceded all of the Colorado land belonging to the entire Ute Indian group, except that to be allotted, cannot stand in the face of the treatment by defendant of that portion of the lands occupied by the Southern Utes. Every action by defendant concerning the Southern Ute Reservation has been based upon the proposition that the Southern Utes were still the rightful owners of the area. The two ultimate acts along that line were the 1895 Act which placed the proceeds of actual sales in a Southern Ute trust fund and the restoration of the undisposed of lands to Southern Ute tribal ownership in 1938.

The further argument is made that the Act of July 28, 1882 (22 Stat. 178) and the Act of February 20, 1895 (28 Stat. 677) were supplementary to the 1880 Agreement (21 Stat. 199) and were merely an attempt to force compliance by the Southern Ute with the terms of the 1880 Agreement wherein they had agreed to accept allotments.

This argument would be more persuasive were it not for defendant's subsequent action. Defendant has not followed a course of conduct with regard to the Southern Ute Reservation which tends to verify [48] such a construction. On the contrary, as briefly outlined above, the actions of defendant have been overwhelmingly opposed to its present position.

The most telling argument against defendant's position in this regard is the treatment accorded the same argument when it was used by defendant in the case of *Confederated Bands of Ute Indians* v. *The United States*, 100 C. Cls. 413, 429-433. There the Court held that defendant acquired under the Agreement of 1880 only the right to sell the lands for the

Utes and not the lands themselves. Consequently it was held that the taking in that instance occurred under the Adams amendment in 1938 unless the land had been disposed of earlier to individuals. This same argument, it seems to the Commission, would apply with equal validity to the Southern Utes.

For the foregoing reasons the Commission concludes that the Southern Utes retained the same interest in their lands and that the lands encompassed within the boundaries of the 110 mile long by 15 mile wide area were acknowledged by defendant as never having been disposed of by the Southern Utes under the 1880 Agreement. In this instance the term Southern Utes is used to include all three bands because up until the separation of the Weeminuche Band under the Act of February 20, 1895 (28 Stat. 677) they too had an interest in the whole. There is, however, no claim made herein by the present-day Southern Utes for any of the reservation set apart for the present-day Ute Mountain Utes under the 1895 Act.

Defendant's reliance upon Court of Claims case No. 30360, *The Ute Indians* v. *The United States*, 45 [49] C. Cls. 440, is misplaced in view of the Commission's decision that the June 15, 1880 Agreement (21 Stat. 199) did not effect the disposition of the Southern Ute Reservation. The accounting had in that case which included any of the Southern Ute lands disposed of under the February 20, 1895 Act (28 Stat. 677) was clearly beyond the jurisdiction of the Court of Claims under the terms of the Jurisdictional Act of March 3, 1909 (35 Stat. 788-789) which conferred jurisdiction upon the Court to carry out the terms of the June 15, 1880 Agreement.

The error which caused the proceeds already placed to the credit of the Southern Ute Tribe to be includ-

ed in that judgment was just that, an error on the part of all concerned. Under the terms of the 1895 Act those funds had been handled separately from the funds of the other Ute tribes. The lands had been opened at different times by different acts from those involving the Confederated Ute lands and the money had been placed in a trust fund to the credit of the Southern Utes, whereas the money received from land sales under the 1880 Agreement was placed to the public treasury instead of to the credit of the Confederated Utes.

Defendant also relies upon other litigation between the Confederated Ute Bands and itself. Specifically, defendant pleads the cases found in 100 C. Cls. 413, 112 C. Cls. 123, and 117 C. Cls. 443, being the series of cases between the Confederated Bands of Ute Indians and defendant which arose under the Jurisdictional Act of June 28, 1938 (52 Stat. 1209) as amended. This litigation did not include any of the lands of the Southern Ute Tribe which are in controversy in this case.

The stipulation entered into between the Confed- [50] erated Utes and defendant as a part of the judgment in those cases was limited to lands ceded under the Act of June 15, 1880 (21 Stat. 199) and under the Jurisdictional Act, as amended, of June 28, 1938.

While petitioner herein, the Southern Utes, was a constituent part of the petitioner therein, Confederated Utes, it is not precluded from bringing this different cause of action under its own name and in its own right. By the same terms, any language in the stipulation settling the cases under the 1938 Jurisdictional Act will not bar defendant from asserting offsets, if any, which it may have against the petitioner herein. This is a separate and distinct cause

of action from any of those asserted in the prior cases and neither petitioner nor defendant is bound by the proceedings therein with regard to the matters being litigated in this case.

As stated in *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933):

* * * *

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *Sac County*, 94 U.S. 351, 352, 353; *Southern Pacific R. Co.*, v. *United States*, 168 U.S. 1, 48; *United States* v. *Moser*, 266 U.S. 236, 241.

* * * *

As we have stated above, this is a separate and distinct cause of action by a different petitioner for lands disposed of pursuant to the Act of February 20, 1895 (28 Stat. 677) as free homesteads. This, of course, places the present case squarely within the [51] law as set forth above in the *Tait* case in that, even assuming the parties were the same, the claim herein is upon a different claim or demand.

For the above reasons we are of the opinion that petitioner, the Southern Ute Tribe as it presently exists, is entitled to recover of defendant upon its claim for the value of 230,547.44 acres of land disposed of by defendant from their reservation with-

out compensation therefor as called for by the Act of February 20, 1895 (28 Stat. 677).

The question as to whether the taking was one under the Fifth Amendment to the Constitution seems to be well settled under several decisions of the Supreme Court and the Court of Claims, which decisions have been followed by this Commission.

The title under which the Southern Utes held their reservation was recognized by the Treaty of March 2, 1868 as being in the Confederated Utes of which they were then a part. Thereafter defendant by several different actions mentioned earlier in this opinion reaffirmed the title of the Southern Utes to their reservation after the Act of June 15, 1880 separated them by placing the remainder of the original reservation under the control of defendant.

The taking of petitioner's recognized title by defendant constituted a taking under the Fifth Amendment to the Constitution for which petitioner is entitled to recover just compensation based upon the value of the lands as of the date or dates of taking, together with interest thereon sufficient to produce the present full equivalent of the value of those lands as of the date or dates of taking. *Creek Nation* v. *United States*, 295 U.S. 103 (1935).

[52] The taking of these lands by defendant covered a period of many years because they were disposed of as free homesteads and soldiers' additional homesteads, so each taking occurred when the ownership of each individual became final. *Creek Nation* v. *United States*, 302 U.S. 620, 622 (1938).

As suggested in the *Creek* case cited above, the dates would normally be the date of the patent to the individuals. Since this would be a burdensome job it is suggested that an average date or dates be worked out by the parties subject to the approval of the Commission.

It would appear that defendant's asserted defense of lack of necessary parties is a constituent part of its claim that the entire Colorado Reservation of the Confederated Utes was ceded in 1880. Had that been the case then the present-day Ute Mountain Utes as well as the remainder of the Confederated Utes would have been necessary parties. Since it has been determined that petitioner's lands were not ceded by the 1880 Agreement this defense is of no validity.

Also, any claim which the Ute Mountain Utes might have, if any, would be separate from the claim of petitioner. Petitioner herein claims no land in the present-day Ute Mountain Reservation.

The next phase of petitioner's case concerns the handling by defendant of its trust fund moneys arising from the sale of the Southern Ute Reservation lands under the terms of the Act of February 20, 1895.

Defendant contends that this accounting claim is not within the jurisdiction of this Commission because of the failure of petitioner to allege such a cause of action prior to the expiration of the five year [53] period of limitations provided by Section 12 of the Indian Claims Commission Act, 25 U.S.C., Sec. 70k. This period expired on August 13, 1951 and defendant contends that this accounting claim was first alleged in 1963 by means of exceptions by petitioner to defendant's accounting report filed in response to the petition.

Petitioner included among its allegations contained in the petition filed on August 10, 1951, a claim for an accounting for moneys received by defendant for some 81,953.18 acres of land disposed of in various ways other than as free homesteads or soldiers' additional homesteads. As stated previously this allega-

tion is found in paragraph 8f and the allegations of damages are found in paragraphs 9c and 9d of the petition.

Defendant presented to petitioner an accounting report by the General Accounting Office in reply to the allegation contained in the petition. This report set forth, among other things, an accounting of the proceeds derived from the sale of certain lands pursuant to the Act of February 20, 1895, together with an accounting of the interest on said proceeds during the period from February 12, 1929 to June 30, 1951.

Petitioner, after receiving this report, proceeded to file exceptions to certain matters contained therein. These exceptions were filed June 12, 1963.

On September 30, 1963 petitioner filed an amendment to its exceptions, adding thereby two more exceptions, the last of which calls for an extension of the accounting by defendant "up to date".

Defendant's objection goes specifically to the fact that petitioner has requested an accounting in its pe-
[54] tition for certain specific items and has now raised by means of the exceptions mentioned above, and after the receipt of defendant's General Accounting Office Report, certain general accounting claims not referred to in its petition.

Defendant's contention, carried to its ultimate conclusion, would seem to place upon petitioner the burden of knowing what defendant had done with its money before filing its petition. This would be unreasonable on its face. Petitioner cannot be expected to know what its trustee has done with money under its control until such time as petitioner is presented with the figures.

The essential question is whether petitioner is to be penalized for not calling for a general accounting

instead of an accounting for specific items which it had reason, based upon the terms of the Act of February 20, 1895, to suspect might have been mishandled by defendant.

This is a matter peculiar to our organic act with its definite period of limitations. It is not readily apparent how a similar question could arise under general law since limitations would not, as a normal rule, begin to run until the aggrieved party knew, or should have known, that his trustee had created a cause of action through the handling of the trust moneys.

We think that much the same principle should apply to a similar situation under our enabling legislation and that the issues raised by petitioner as a result of defendant's accounting are reasonable in that petitioner was not in a position to know whether defendant was properly executing its duties as trustee. Defendant, being in the unique position of not having to file periodic accountings to its Indian wards, should not be allowed to take advantage of that fact for its own protection.

[55] We are of the opinion that the allegation for a specific accounting which brought forth the accounting report and thereby revealed other and further apparent misuse of petitioner's funds, is a sufficient basis for requiring a further and complete accounting from defendant with regard to those items questioned by petitioner in its exceptions.

The Commission is aware that defendant restricted the introduction of the General Accounting Office Report to the issue of liability for the land allegedly disposed of free and the specific accounting for lands as stated in the petition. However, defendant cannot restrict the purposes for which its evidence is introduced and thereby deny petitioner the right to an ac-

counting for which a basis has been established in the petition.

The exceptions to defendant's accounting filed by petitioner are a part of the pleadings in the case and will not be set forth in the findings or opinion. However, it is necessary to discuss them for the purpose of clarity and understanding of the Commission's ruling with regard to each of them. They will be referred to by number as they appear in the pleadings.

It should be noted at this point that defendant rested its defense entirely upon other grounds and has not yet answered or contested these exceptions. This places the Commission in the position of ruling upon matters contained in the exceptions without benefit of a defense thereto. However, under the decision of the Commission defendant is called upon to file a further accounting and is entitled to know as [56] nearly as possible the extent to which it will be required to expend the present accounting report. The Commission will entertain such further proceedings as may in its opinion be necessary to insure a complete record in this matter.

It should be pointed out at this juncture that the Commission in this opinion is restricting its rulings to the questions arising under existing agreements between petitioner and defendant, i.e., the Act of February 20, 1895 (28 Stat. 677), wherein by Section 5 it was agreed that certain moneys of the Southern Ute Tribe would be held in trust and to such Acts, i.e., Act of April 1, 1880 (21 Stat. 70), providing for interest on sums received from the sale of Indian trust lands; Section 3659 of the Revised Statutes (31 U.S.C. § 547a) which establishes the rate of interest on such sums at not less than 5% per annum; and Act of February 12, 1929 (45 Stat.

1164) as amended by Act of June 13, 1930 (46 Stat. 584), providing that funds in excess of $500 held in trust by defendant in principal accounts upon which interest was not otherwise payable, should bear simple interest at the rate of 4% per annum.

The Commission does not intend to express any opinion concerning the duties or obligations of the Congress under its plenary power over Indian affairs.

Exception No. 1 concerns petitioner's right to have its moneys covered into the Treasury of the United States without undue delay. The Court of Claims in the case of *The Menominee Tribe of Indians* v. *United States*, 107 C. Cls. 23, 32-33 (1946) stated that 30 days was a reasonable time in which to deposit moneys belonging to the Menominee Tribe. The ruling thereon was based upon an implied agreement by [57] defendant under the Acts involved to make a prompt deposit of the money. The Commission is of the opinion that the duty owed by defendant in its fiduciary capacity (See *Seminole Nation* v. *United States*, 314 U.S. 286 (1942) and *Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 10, 19) is sufficient cause to insure that administrative delays shall not deprive an Indian tribe of interest upon those funds on which it may be entitled to draw interest. Defendant shall supply the pertinent information insofar as the records will permit.

Exception No. 2 questions the practice of defendant with regard to the advancement of tribal trust funds to disbursing agents. Petitioner alleges on information and belief that there exists in many cases an inordinate delay between the time money is credited to the account of the disbursing agent, thereby stopping the payment of interest, and the time of its actual disbursement. During this period of time defendant has the use of this money without

the payment of interest, petitioner alleges. This information is not reflected in the General Accounting Office Report and so it is impossible to tell whether the allegation is correct. Petitioner, as *cestui que trust* "* * * is entitled to demand of the trustee all information about the trust for which he has any reasonable use". (Bogert, Trusts & Trustees, § 961). Defendant, as trustee, is under a duty to furnish such information, insofar as possible.

Exception No. 3 deals with defendant's alleged failure to credit interest at the rate of 5% on petitioner's tribal fund "Proceeds of Southern Ute Reservation" and the failure of defendant to show in its accounting the loss occasioned thereby.

[58] Since the statutes appear to be quite clear with regard to the duty of defendant to deposit such funds (21 Stat. 70) and make them productive (31 U.S.C. § 547a) in its capacity as trustee, then it is bound to credit such interest and to show its calculations in doing so in order that petitioner may check the results of such calculations. See *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802 (1946); *Wootton Land & Fuel Co.*, v. *Ownbey*, 265 Fed. 91, 99-100 (C.C.A. 8, 1920).

Exception No. 4 concerns the erroneous transfer of $193.25 from petitioner's fund "Proceeds of Southern Ute Reservation" to the "Confederated Bands of Utes 4% Fund" and the interest lost by such transfer.

This exception seems clear on its face and defendant must account for the transfer and the interest lost thereby. The money involved belonged to the Southern Utes and not to the Confederated Bands.

Exception No. 5 deals with a similar erroneous transfer of $800 from petitioner's fund "Interest on

Proceeds of Southern Ute Reservation" to the fund "Interest on Ute 5% Fund, Southern Ute".

Page 17 of the G.A.O. Report shows this to have been an erroneous transfer and petitioner is entitled to an accounting and correction.

Although not mentioned in the exceptions there is shown on Page 7 of the G.A.O. Report an erroneous credit of $7.74 to the Confederated Bands. This would seem *de minimus* but petitioner is, nevertheless, entitled to an accounting and correction.

Exception No. 6 deals with a variety of expenditures from petitioner's funds which petitioner alleges [59] are improper as being obligations of defendant. Petitioner then specifically excepts to the failure of defendant to disclose (a) the amount of petitioner's tribal funds expended for obligations of the defendant, and (b) the amount of interest lost to petitioner as a result of this alleged improper use of petitioner's funds by defendant.

This appears to be a situation wherein petitioner would deprive defendant of its right to defend its actions as trustee whether right or wrong. To force defendant to judge its actions and convict itself is improper. The G.A.O. Report sets forth the various expenditures and it then becomes a question of their legality under the agreements and statutes which may be applicable. Their legality is a question which ultimately must be determined by the Commission. Until that determination is made there can be no calculation of damages, if any, through loss of interest.

This is the same type of problem which this Commission had in mind when it stated in its opinion in *Sioux Tribe, et al* v. *United States*, 12 Ind. Cl. Comm. 541, 549, that it would not force defendant to point out its own wrongs under the guise of having to

carry the burden of proof. The filing of an exception to the G.A.O. Report whereby the same procedure is attempted will not be permitted.

Since the specific expenditures set forth within Exception No. 6 carry with them in the G.A.O. Report the amount expended through June 30, 1951, the Commission presumes that the broad language of Subsection 6(a) of Exception No. 6 must be intended [60] to refer to other as yet undisclosed expenditures and in that light is of the opinion set forth immediately above.

As to those specific items mentioned in Exception No. 6, it shall be incumbent upon defendant to satisfy this Commission as to their legality. (*The Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 801-802) Until that decision is reached there can be no accounting by defendant with regard to these specific items insofar as loss of interest, if any, is concerned.

Exception No. 7 goes into the broad problem of defendant's expenditures from various funds belonging to petitioner. It is petitioner's contention that defendant's fiduciary obligation required it to expend petitioner's money in a manner so as to conserve it to the best advantage of petitioner. Specifically petitioner contends that wherever defendant chose to disburse money from a fund or funds bearing a higher interest rate than another fund or funds which were or should have been equally available and which carried no interest or a lower rate of interest, it was guilty of enriching itself at the expense of its *cestui que trust*.

On the evidence before us it appears that the situation with regard to the expenditures from various funds does not differ in this case from that of the *Menominee Tribe* v. *United States*, 101 C. Cls. 10, 21 (1944), wherein the Court stated:

* * * *

> We conclude, therefore, that to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs [61] of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non-interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them.
>
> * * * *

Defendant will furnish the appropriate information in its supplemental accounting.

Exception No. 8, filed by way of amendment after discovery by petitioner of the information contained in the G.A.O. Report for Case No. 47567 before the Court of Claims, consists of an objection to the failure of defendant to credit interest at the rate of 5% on its fund "Indian Moneys, Proceeds of Labor, Southern Ute Indians" and to the failure of the G.A.O. Report to show the amount of interest lost thereby.

Petitioner ends this exception with the statement "* * * as required by law". There is in evidence no statute or statutes requiring the payment of interest at 5% on miscellaneous funds. The only statute to which our attention has been called is that of February 12, 1929 (45 Stat. 1164), as amended by the Act of June 13, 1930 (46 Stat. 584) which requires that tribal funds included in the fund "Indian Money, Proceeds of Labor" should bear simple interest after July 1, 1930 at the rate of 4%.

Insofar as the accounting shown in Petitioner's Exhibit No. 25 (accounting in Case No. 47567)

deficient under those statutes, defendant shall prepare a proper accounting.

[62] It is the opinion of the Commission that on the record before us petitioner is entitled to 4% interest from the date of the applicable statute of June 13, 1930 (46 Stat. 584) and not to the 5% claimed. It is also entitled to have the accounting brought up to date, including the interest due, if any.

Petitioner contends that the moneys received by defendant from sales of timber, water and iron, from grazing fees and from land leases, are proceeds of the land and constitute an element of value in those lands and so should have interest credited at 5% the same as the land proceeds. Petitioner cites *United States v. Klamath Indians*, 304 U.S. 119, 122 (1938) as support for this contention.

We do not agree that this case is in point. In that case the Indians would have been denied the value of the timber had it not been included in the value of the land. This is not the case here. The value of these elements has been received by petitioner and we are now talking of the amount of interest to be paid by defendant under the appropriate statutes on those funds after they come under defendant's control as trustee.

It is our opinion that once those elements were converted to money in the Treasury they assumed the character of general funds and as such fell under the statute calling for 4% interest rather than the statute requiring 5% interest on moneys from trust lands.

Petitioner also amends Exception No. 6 to include the specific expenditures listed in the portion of the G.A.O. Report in Case No. 47567 known as Petitioner's Exhibit No. 25 in this case. The same ruling [63] applied in Exception No. 6 would apply to these expenditures. Defendant, as trustee, must satisfy this

Commission as to their legality under the *Sioux* case cited in Exception No. 6, and no further accounting can be had until this is done.

Exception No. 9 raises the question as to the adequacy of defendant's G.A.O. Report since it does not account beyond June 30, 1951.

This is a question of first impression with this Commission. The closest analogy to this situation within the Commission's decisions is the matter of offsets. In the case of *The Kiowa, Comanche and Apache Tribes* v. *United States*, 5 Ind. Cl. Comm. 72, 109-111, the right of defendant to present claims for gratuitous offsets beyond the cutoff date for filing cases before the Commission was upheld.

This ruling was made on the authority of the Court of Claims decision in the *Sioux Tribe of Indians* v. *United States*, 105 C. Cls. 725, 811-812, wherein the Court did allow offsets by defendant after the closing date of the jurisdictional act permitting the suit.

The *Sioux* case was an accounting case just as this part of the present case is. The Court stated as follows:

* * * *

> Plaintiff does not ask that final judgments be now entered for the amounts of the balances shown, but contends that since it was the duty of defendant under the allegations of the original petition to make a complete accounting with reference to these and other trust funds, and such accounting has not been rendered subsequent to June 30, 1925, judgments should be entered that plaintiff is entitled to recover with respect to the balances and that further proceedings should be had under Rule 39(a) to determine, on further accounting, the exact amounts, if any, for which
> [64] final judgments should be entered. In other words plaintiff says that after we have decided

the issues presented we should order a further accounting as to the balances and allow plaintiff another opportunity to raise further issues if it should so desire.

There must be an end to the cases. We cannot keep them open indefinitely for plaintiff's convenience in order that it may have several trials and decisions in each case as to its legal right to recover on the issues presented and which may be later presented before closing the cases on final accounting as to the offsets, if any, against such amounts as may be due under the decision on the issues presented when the cases were prepared, argued and submitted. Rule 39(a) was not intended to authorize or provide for several trials on questions as to legal rights of an Indian Tribe to recover, or to permit piecemeal trials in chief. Plaintiff knew when it received the accounting report on April 19, 1932, that the accounting ended on June 30, 1925, and no mention was made of the matter until the briefs in the seven cases were filed. The cases were argued and submitted on the specific issues decided herein, and if plaintiff believes that it has other or further claims it must petition Congress for relief or for further permission to sue thereon. Plaintiff has had its day in court as to the right of recovery on all issues which it saw fit to raise, prepare and submit for decision. The time has passed for asking for a remand for a further or supplemental accounting on matters concerning questions required to be tried and submitted in the first trial under Rule 39(a). Cf. *Cherokee Nation* v. *United States*, 102 C. Cls. 720, 760.

* * * *

It will be noted from the above quoted language that the basis for the Court's refusal to permit a further accounting from defendant was based upon the failure of petitioner to raise the question in a timely manner. The case had been completed upon the issues presented after petitioner had the G.A.O. Report and knew its closing date. It is obvious that the Court could foresee an endless round of trials with defendant updating offsets and petitioner updating accounting claims. Primarily, however, the Court appeared [65] to feel that petitioner had failed to take advantage of its opportunity to raise the matter before the deadline for filing under the jurisdictional act.

We have held herein that petitioner is not barred from raising the accounting issues under Section 12 of our organic act and so any claim for an up-to-date accounting is still a "live" claim as well.

We too accept the necessity for an end to these cases and under the same circumstances as in the *Sioux* case would feel bound to follow the decision of the Court of Claims therein.

Since this is a matter wherein defendant will be under the necessity of accounting further for its handling of petitioner's money and the issues are not yet closed by decision of the Commission it is our opinion that defendant should bring its accounting up to the date of the judgment herein. This would be equivalent to the right of defendant to assert offsets to the same date. Since our act is silent as to both questions it appears equitable that both parties be treated the same with respect to the offsets of defendant and the accounting due petitioner.

This matter will now proceed to a determination of the date or dates of taking of the 230,547.44 acres of petitioner's lands by defendant and the value of said lands on such date or dates.

Since no consideration was paid for these lands, that phase of the litigation is not involved and defendant may proceed to amend its answer and set forth its offsets, if any, in conformity with the rules of the Commission.

[66] The accounting phase of this case may not proceed until a decision is reached with regard to the specific expenditures alleged by petitioner to have been improperly made by defendant. The parties shall proceed immediately to present to this Commission their evidence and arguments concerning the expenditures listed in Finding of Fact No. 16 and those set forth in Court of Claims Case No. 47567 and which are listed in Petitioner's Exhibit No. 25 in this case wherein they properly belong.

Upon the decision as to these expenditures defendant will be required to file its supplemental accounting.

An order to the above effect will be entered.

T. HAROLD SCOTT
Associate Commissioner

We concur:

ARTHUR V. WATKINS
Chief Commissioner

WM. M. HOLT
Associate Commissioner

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Act of July 28, 1882, 22 Stat. 178 3
Act of May 1, 1888, 25 Stat. 133 3
Act of February 20, 1895, 28 Stat. 677 ..... 1, 2, 3, 4, 7
Act of February 12, 1929, 45 Stat. 1164 8
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Act of August 13, 1946 (Indian Claims Commission Act), 60 Stat. 1049; 25 U.S.C. 70, *et seq.* 4, 5
R.S. § 3659, 31 U.S.C. 547a 7

Other:

Indian Land Cessions in the United States, Charles C. Royce (18th Ann.Rep., B.A.E. 1896-1897) 2
Rule 20, Rules of Supreme Court, 28 U.S.C. 34 6
Sen. Doc. 194, 76th Cong., 3d Sess., Vol. V, Indian Laws and Treaties, Charles J. Kappler, pp. 659-660 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA,
Petitioner,

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

This brief is filed by respondent, Southern Ute Tribe, in opposition to the petition of the United States for a writ of certiorari to review the interlocutory judgment of the United States Court of Claims entered in this case on March 20, 1970.

QUESTIONS PRESENTED

1. Whether the United States, as trustee of the Southern Ute funds collected through the disposal of tribal reservation lands pursuant to the Act of February 20, 1895, 28 Stat. 677, is required, where the Indian claim was for a "true, complete and proper accounting" of such funds, to account for its handling of the tribal funds up to date, when a report filed by the United States in 1953 disclosed

that the governmental wrongdoing began in 1899 and has a continuing effect.

2. Whether the claim is barred by *res judicata*, where the court below held that the lands involved in this case were disposed of by the United States under the 1895 Act and not, as the government had insisted, under a prior 1880 Act which included lands involved in an earlier settlement agreed to by another claimant, the Confederated Bands of Ute Indians, and approved by the same court.

COUNTERSTATEMENT OF THE CASE

In an 1868 treaty, the Confederated Bands of Ute Indians, including the Southern Ute Tribe, respondent here, agreed to a cession of their ancestral homeland and retained a smaller reservation in western Colorado which the United States promised to hold for their "absolute and undisturbed use and occupation" (15 Stat. 619).[1] By another agreement, ratified as amended by the Act of June 15, 1880 (21 Stat. 199), the Confederated Bands ceded to the United States in trust for disposal the 1868 treaty reservation,[2] except for an area retained for the Southern Utes, who "agree[d] to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colo-

[1] Appendix A shows the retained area. It is a diagram of part of Map 9, Areas 556, 616 and 617, Charles C. Royce, *Indian Land Cessions in the United States*, Colorado 1 (18th Ann.Rep., B.A.E. 1896-1897, Part II).

[2] In 1873, the Confederated Bands ceded a highly-mineralized, square-shaped, area in the east-central portion of the 1868 treaty reservation, comprising about 3.7 million acres (18 Stat. 36; Royce Area 566). This left intact a strip of land in the southwest corner of Colorado, 15 miles wide and 110 miles long (Royce Area 617). This was part of the area the Southern Utes had previously occupied and it became the Southern Ute Reservation. This strip was connected with the main body of the diminished 1868 treaty reservation by a corridor of land 20 miles across along the eastern Utah border. Lands in the 15-mile strip are involved in the present case. See Appendix A and the description of the events by the Court of Claims in the decision below (Pet.App. 16).

rado." [3] This area was within the 1868 treaty reservation area, was the area historically occupied by the Southern Utes, and was thereafter known as the Southern Ute Reservation.

From and after the 1880 Act, as before that date, the Southern Utes continued to live on their reservation in southern Colorado. It is where they were furnished assistance by the government and it has been administered at all times since by the United States as the Southern Ute Reservation. The 1880 Act, and subsequent Congressional enactments, provided for the removal of all other groups of Confederated Utes from Colorado and for the disposal of the former 1868 treaty reservation under the public land laws.[4] But the Southern Utes were treated differently from the other Utes. They retained their reservation in southwest Colorado where they had long resided, were then residing and on which they still reside.[5]

If there were any inconsistencies in the year-by-year governmental relations with the Southern Utes after the 1880 Act, they were resolved by the Act of February 20, 1895 (28 Stat. 677). That Act was similar to the 1880 Act in that it authorized allotments of lands to individual

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[3] Royce Area 617.

[4] These include: the Act of July 28, 1882, 22 Stat. 178, declaring all of the former 1868 treaty reservation, except the Southern Ute Reservation, to be public lands of the United States and authorizing a partial boundary survey of the Southern Ute Reservation; the Act of May 1, 1888, 25 Stat. 133, authorizing negotiations with the Southern Utes for an exchange of "their reservation"; and the almost annual Congressional reports on the Southern Ute situation. This chronology of events was thoroughly considered by the court below. Pet.App. 19-25.

[5] The government's statement that "For a while," the Southern Utes "were permitted to remain" on the 15-mile strip is incomplete and inaccurate (Pet. 3). The Southern Ute Reservation is still there and the Southern Utes are still there, as they have been since a long time prior to 1880. All other Utes were removed from Colorado by 1882. *Confederated Bands of Ute Indians* v. *United States*, 100 Ct.Cl. 413, 417 (1943).

Southern Utes and the disposal of the unallotted, surplus lands to settlers, the proceeds to be held in trust for the sole use and benefit of the Southern Utes (28 Stat. 679). Thus, it was only by the 1895 Act that the United States for the first time obtained authorization from the Southern Utes to dispose of the surplus lands on their reservation.

Disposals of Southern Ute reservation lands were made under the 1895 Act, and the proceeds were collected and held by the United States. The result was that a set of Southern Ute land disposition accounts was maintained by the United States in the name of and for the benefit of the Southern Utes under the 1895 Act,[6] completely separate and apart from the 1880 Act land disposition accounts maintained for the remainder of the former 1868 treaty reservation lands in which all of the Confederated Bands of Ute Indians shared.[7]

On August 10, 1951, the Southern Ute Tribe filed the two claims here involved under the Indian Claims Commission Act (60 Stat. 1049). Both claims arose out of the 1895 Act. One claim was for just compensation for the taking by the United States of over 220,000 acres of Southern Ute reservation land by giving it away to settlers as free homesteads without payment of compensation to the Tribe, and the other was for a "true, complete and proper accounting" of the trust proceeds received by the United States from the disposal of an additional 82,000 acres of surplus reservation land.[8]

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[6] These funds were collected by the Department of the Interior and carried on the United States Treasury books under the heading "Proceeds of Southern Ute Reservation."

[7] The Southern Ute lands not disposed of pursuant to the Act of 1895 were restored to tribal ownership by order of the Secretary of the Interior on September 14, 1938. Sen.Doc. 194, 76th Cong., 3d Sess., Vol. V, Indian Laws and Treaties, Charles J. Kappler, pp. 659-660.

[8] A claim is asserted in a "petition" in the Indian Claims Commission and the Court of Claims. In order to avoid confusion be-

The government asserted the defense of *res judicata* as to both claims. This defense was based on a 1950 stipulation of settlement and judgment entered thereon by the Court of Claims in a case brought by the Confederated Bands of Ute Indians (117 Ct.Cl. 433). The defense was rejected by the Commission and the Commission was affirmed on appeal by the Court of Claims (Pet.App. 30-32, 40). The government is therefore obligated to pay just compensation for the taking of 230,547.44 acres, according to respondent's latest tally, with the value to be assessed after another hearing by the Commission.

In response to the complaint, the government supplied a report by the General Accounting Office dated February 18, 1953.[9] It purported to furnish the accounting requested in the complaint. In accordance with pleading procedures established prior thereto by the Indian Claims Commission, the Tribe filed exceptions to the accounting report.[10] The government now asserts such exceptions constitute "new claims" barred by the limitation included in the Indian Claims Commission Act (60 Stat. 1052; 25 U.S.C. 70k). The Commission held that since the Tribe had requested an accounting for the handling of its funds, the government was obligated to furnish a "further and complete accounting" based on the matters revealed in the report furnished in response to the complaint (Pet.App. 81-82). The Court of Claims held that the Tribe's exceptions constituted amendments to the original complaint, that they related back to the date of filing, and that the original complaint had sufficiently apprised the govern-

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tween those and the petition for certiorari, the petition in the Indian Claims Commission will be referred to herein as the "complaint." The complaint also included a prayer for "such other and further relief as the Commission may deem fair and equitable."

[9] The government's answer to the complaint was filed approximately three years after the GAO report was filed.

[10] See p. 8, *infra*, fn. 15.

ment of the scope of the claim.[11] As the Commission indicated (Pet.App. 83), defendant has not responded to the exceptions, but has rested its defense entirely on other grounds.[12]

REASONS FOR DENYING THE WRIT

1. Contrary to the assertion by the government, the decision of the Court of Claims will not expand the jurisdiction of the Indian Claims Commission, nor will it jeopardize the government's ability to conclude cases within a reasonable time (Pet. 6). The decision is restricted to the unique and isolated situation involving the Southern Ute Tribe. Whatever examples horrible are conjured in the petition for certiorari, the only visible effect of the decision below is correctly summarized by the government's statement that it "does not in itself involve legal issues of general importance" (Pet. 12).[13] The decisions of the Court of Claims and the Indian Claims Commission do no more than provide for procedural compliance in disposing of claims involving tribal lands and accounting for trust funds[14]—something which the Indians assumed the United States had been properly doing through the years.

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[11] Pet.App. 38-40. Although the rationale of the court differs from that of the Commission (Pet.App. 39), both reached the same result. The Court of Claims pointed out that the Commission had not had the benefit of controlling determinations by the court between the Commission's ruling and the date this case reached the Court of Claims (Pet.App. 39).

[12] Since there has been no reply by petitioner, nor a hearing on the exceptions, it is well to remember that this case is still in an interlocutory posture. Any unjustified requests for accounting can be sorted out by the Commission at the hearing.

[13] It is difficult to determine whether this concession relates only to the accounting claim. In any event, it would seem to apply with equal force to the just compensation claim. *Cf.*, Rule 20, Rules of this Court.

[14] In discussing one of its obligations as trustee to the Southern Utes under the 1895 Act, the government conceded it "did not honor that obligation" (Pet. 4).

The generosity attributed by the government to the decision of the Court of Claims is a contrived effort to manufacture a reason for granting the writ. The rationale of the court below is well founded. It undertook a review of its prior decisions and judgments involving the Confederated Bands of Ute Indians, including the Southern Utes, to see whether the present claims had been previously concluded, and determined they had not. It then affirmed the Indian Claims Commission decision as to the taking and accounting claims (Pet.App. 41). Nothing done by the court below or the Indian Claims Commission expands the jurisdiction of the Commission.

The idea that the government perceives the decision of the Court of Claims to be wrong (Pet. 12) is no ground for review by this Court. There is no suggestion of conflict and none exists. No constitutional or general questions are involved, no final judgment has been entered (Pet.App. 41), and due regard should be taken of the Commission's interlocutory order for "further proceedings" before that tribunal "to insure a complete record" (Pet.App. 83).

2. The government overstates what is involved in the accounting claim. In 1951, the Southern Ute Tribe sought "a true, complete and proper accounting" of its trust funds collected by the United States from the disposal of some 82,000 acres of its reservation land under the 1895 Act. The funds were to be held by the United States "in trust" for the sole use of the Southern Utes (28 Stat. 678). The government has not accounted for those funds. In 1953, the government furnished a partial and largely uninformative list of moneys received and annual itemizations of disbursements, which were carried on the books of the United States Treasury under the heading "Proceeds of Southern Ute Reservation." These had been collected pursuant to the 1895 Act during the period April 13, 1899 to June 30, 1951. Although these were trust funds and federal law required the payment of 5 per cent in interest on all such accounts (R.S. § 3659, 31 U.S.C.

547a; Act of April 1, 1880, 21 Stat. 270, 25 U.S.C. 161), it was not, strangely enough, until 1929, and under a completely different authority, that the government condescended to pay any interest at all for the use or retention of the Tribe's money, and then at only 4 per cent (Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, 25 U.S.C. 161a, 161b).

Following the usual practice of the Indian Claims Commission in accounting cases,[15] the Tribe filed "exceptions" to the General Accounting Office report. These exceptions did not create "new" or "general" accounting claims. They were rather the specific assertions, for this claim, of principles of accounting long established in cases involving Indian trust funds derived from the disposals by the United States of tribal lands and natural resources.[16]

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[15] The exceptions to the report conform to the pleading procedure established by the Indian Claims Commission. *Sioux Tribe, et al.* v. *United States*, 12 Ind.Cl.Com. 541 (1963). They are pleadings in the case (Pet.App. 83) and were treated by the Court of Claims as amendments to the complaint which relate back to the original filing date (Pet.App. 39-40).

[16] The issues raised by the exceptions relate to the government's handling of the trust funds derived from tribal land disposals. We apply to this case the time-honored fiduciary standards under which the government, as trustee, owes a distinctive obligation to the Southern Utes. All are settled principles of accounting. *Menominee Tribe* v. *United States*, 101 Ct.Cl. 10, 20-22 (1944); *Sioux Tribe, et al.* v. *United States*, 105 Ct.Cl. 725, 801-802 (1946); *Menominee Tribe* v. *United States*, 107 Ct.Cl. 23, 32-33 (1946). Based on this authority, the Commission found as follows:

> "20. Petitioner [Southern Ute Tribe] is entitled to recover the total amount by which its funds would have been increased (1) through the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest." 17 Ind.Cl.Com. 28 at 41.

They simply make even more specific the original plea for a "true, complete and proper accounting" and could not have been made until we had reviewed the report filed by the government in this case—a report which contained what the court below characterized with charity as "various ignoble confessions" (Pet. App. 39).

Although insistent that "new claims" were filed after the statute of limitations expired, the government supports its assertions by arguing that (1) Congress is impatient to have all Indian claims finally adjudicated, and (2) the few accountants now employed by the government to prepare reports dealing with Indian claims cases cannot physically handle the work load (Pet. 6-10).

As to Congressional impatience, we are constrained to remind the government that the Indian Claims Commission Act was adopted to provide for the final adjudication of all claims—an objective which the petitioner seems now to wish to avoid. Upon a complete review of the legislative history, especially the reasons for enacting the Indian Claims Commission Act, the Court of Claims recognized that Congress intended all tribes "should be given the right to have their day in court and have their claims adjudicated," *Otoe and Missouria Tribe* v. *United States*, 131 Ct.Cl. 593, 608-622 (1955), *cert. den.*, 350 U.S. 848. The Act was intended to settle all tribal claims once and for all. The Indian Claims Commission was set up as the tribunal charged with the duty to adjudicate all such claims. This Court has granted certiorari on two occasions involving claims which originated in the Indian Claims Commission. In one, *Peoria Tribe* v. *United States*, 390 U.S. 468, it reversed the Court of Claims and required that the goveernment pay interest as a measure of damages for its failure to invest funds in accordance with a treaty. The other was affirmed by an evenly divided Court. *Creek Nation* v. *United States*, 370 U.S. 157.

As to the physical problem of rendering a proper accounting, the specter of aging employees working themselves into retirement seems particularly irrelevant. Under this peculiar logic, the longer the government can avoid the issue, the less ability it will have to provide the accounting, and the more likely it can escape the accounting altogether. The government's assertion that to fulfill its trustee obligations "would be [a] substantial" task (Pet. 10) comes with doubtful taste for this same petitioner allowed the Indian Tribal Claims Branch of the General Services Administration to decay to a point where it now claims the staff is unable to fulfill the requirements of the Indian Claims Commission Act.

What remains is something about the up-to-date accounting required by the Commission and the court below (Pet. App. 40). The Court of Claims applied the elementary principle that once jurisdiction attaches the court is entitled to see the matter through.[17] That court has applied this principle in an Indian accounting claim, *Gila River Pima-Maricopa Indians, et al.* v. *United States*, 135 Ct.Cl. 180, 186 (1956); 157 Ct.Cl. 941 (1962).[18] Jurisdiction having lodged, the Commission was empowered to order an up-to-date accounting for the continuing governmental wrongdoing which predated and postdated the statutory filing date (Pet.App. 40).

In order to compute what should have been done with the 1895 Act trust funds in the first instance, perhaps the government will have to take into consideration the tribal moneys held in other accounts. This is so because the government's failure to account properly and completely in the first instance permeates the whole history of the ac-

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[17] *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283, 291-292.

[18] The government did not seek certiorari in the *Gila River* case. The Commission, the Court of Claims and Indian claimants have been proceeding in accordance with that ruling since 1956. It now seems late in the game for the government to challenge what the Court of Claims decided was a "good rule." (135 Ct. Cl. at 186).

count. It also permeates the other accounts. Had it paid over promptly the proceeds from the 1895 Act transactions, it is possible that funds in other interest-bearing accounts could have been left undisturbed. A specific accounting is required to develop the interrelationship. This is the "true, complete and proper accounting" which the Southern Ute Tribe has been trying to get since 1951, and to which it was entitled at a much earlier date. The evident desire of the petitioner to avoid the supplemental accounting seems more directed to the concealment of additional ignoble confessions than toward its concern over the procedural issues decided against it. As the Court of Claims pointed out, the government offered no objections to the substance of the rulings on the exceptions to the accounting filed by the Indians (Pet.App. 38).

3. In its second question, the petitioner quibbles with the court below over the scope of a 1950 judgment based on a stipulation of settlement between the Confederated Bands of Ute Indians (including the Southern Ute Tribe) and the United States (117 Ct.Cl. 433). Petitioner tells the Court that unless its plea of *res judicata* in this case is upheld, other Indian tribes may attempt "repudiation" of settlements. No such thing is remotely involved.

What is at stake here is whether the government must pay just compensation for the taking of some 230,000 acres of the Southern Ute reservation land in a manner not sanctioned by the 1895 Act authorizing the disposition of such land, or whether the subject land was part of the 1950 settlement under which the government paid for almost 1,362,000 acres *outside* the Southern Ute Reservation owned by the Confederated Bands of Ute Indians and disposed of under the 1880 Act for their credit. All agree that the subject 230,000 acres are not among the tract-by-tract description of the acreage comprising the land upon which the 1950 settlement stipulation was based. If included at all, the subject land must be covered by an over-all phrase in the stipulation settling

claims for "land formerly owned or claimed by plaintiffs [including the Southern Ute Tribe] in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199)" (Pet.App. 30-32). Since the Southern Ute Reservation was not ceded by that Act, it was not included in the stipulation in 1950.

After an exhaustive examination, the court below determined that the subject lands were ceded to the United States for disposal for the benefit of the Southern Utes by the 1895 Act and not for the Confederated Utes by the 1880 Act (Pet.App. 14-30). All that happened was that the Court of Claims reviewed one of its prior judgments and concluded that the present claim was not involved in the prior case. This thorough review by the Court of Claims, coupled with the independent consideration of the Commission, resulted in conclusions that the 1950 stipulation covered the 1880 Act lands, but the 1880 lands did not include the subject land; therefore, the stipulation was no bar to the present claim (Pet.App. 30-32, 70-79).[19] Even assuming that the 1950 judgment by settlement was susceptible of more than one construction, the Court of Claims was bound to adopt the one which renders the case more reasonable and effective under all the circumstances. *Union Pacific Ry. Co.* v. *Mason City, etc. Ry. Co.*, 222 U.S. 237, 246-247; *Hendrie* v. *Lowmaster*, 152 F.2d 83 (C.A. 6, 1945); *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F.2d 871, 885 (C.A. 6, 1943).

Petitioner is pressing for this Court's attention to factual and procedural questions ruled against it by opinions of the tribunals below. No questions meriting certiorari are presented.

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[19] This seems a fact determination which should not be upset by this Court "in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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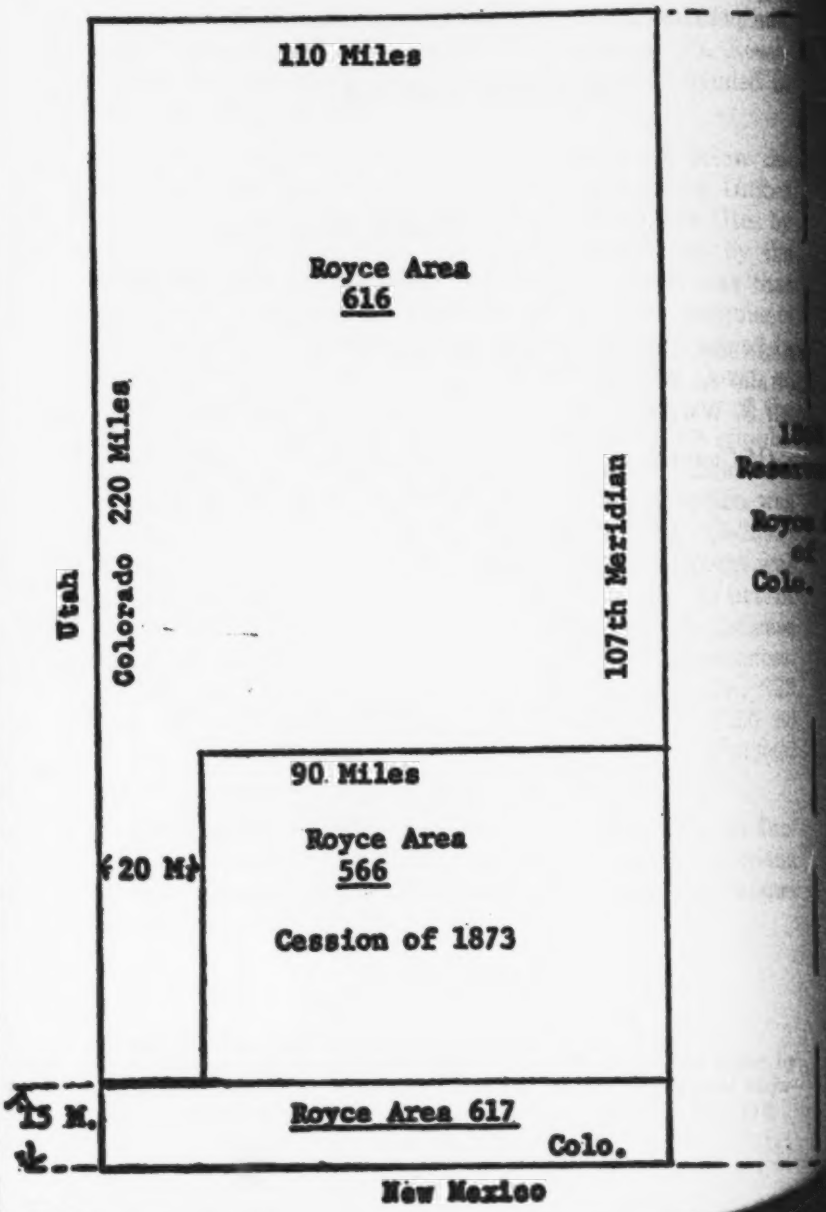
APPENDIX A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Miscellaneous:
Barron & Holtzoff, *Federal Practice & Procedure*, § 448 (1960) 36
Ehrenfeld, *Legislative Material on the Indian Claims Commission Act of 1946* 33
Indian Land Cessions, 18 Ann. Rep., B.A.E. 1896–1897, Part II 5
3 Moore, *Federal Practice*, para. 15.15 36

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Claims (App. 68–129) is reported at 423 F. 2d 346. The opinions of the Indian Claims Commission (App. 24–56, 60–67) are reported at 17 Ind. Cl. Comm. 28 (May 6, 1966) and 21 Ind. Cl. Comm. 268 (additional findings of fact, June 27, 1969).

JURISDICTION

The decision of the Court of Claims was issued on March 20, 1970 (App. 68). On June 10, 1970, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1970, and on July 29, 1970, he further extended the time for filing the peti-

tion until August 10, 1970. The petition was filed on August 10, 1970, and granted on November 16, 1970 (App. 147). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission has jurisdiction under 25 U.S.C. 70 to entertain a claim filed in 1963 for a general accounting, brought up to date, of funds unrelated to any claims timely filed and pending before the Commission.

2. Whether a settlement agreement reduced to judgment as to an Indian tribe's claims regarding land and property ceded to the United States by a specified Act of Congress bound the tribe as to a tract of land ceded both in that Act and, when the tribe failed to honor its obligations, by a subsequent Act of Congress.

STATUTES INVOLVED

The Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides in pertinent part:

> Sec. 2. * * * No claim accruing after August 13, 1946, shall be considered by the Commission.

Section 12, 25 U.S.C. 70k, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

Section 24, as amended by the Act of May 24, 1949, 63 Stat. 102, 28 U.S.C. 1505, provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

Relevant provisions of the Act of June 15, 1880, 21 Stat. 199, and the Act of February 20, 1895, 28 Stat. 677, are set out in the Appendix to this brief.

STATEMENT

This case arises out of a suit filed by the Southern Ute Tribe or Band of Indians before the Indian Claims Commission seeking compensation for the government's failure to fulfill its obligations to the Tribe. To the extent that it presents issues of *res judicata*, it requires summary of a long and complex history of relationships and litigation, a history set out in greater detail in the opinions in the Court of Claims. (App. 68) The issues concerning the Tribe's belated demand for a general accounting, on the other hand, require an understanding only of the chronology of this suit, and its relationship to the limits Congress has imposed on the jurisdiction of the Commission.

413-291—71——2

I. HISTORICAL BACKGROUND RELATING TO THE *RES JUDICATA* ISSUE

A. AGREEMENTS RELATING TO THE RESERVATION

The Southern Ute Tribe or Band of Indians is one of a number of bands of Ute Indians which, collectively and for convenience, were called the Confederated Band of Ute Indians.[1] Initially inhabitants of New Mexico, the Confederated Band was prevailed upon after the Mexican Cession to accept a large rectangular area in western Colorado as a reservation. Treaty of March 2, 1868, 15 Stat. 619. One of the constituent tribes, the White River Utes, roamed the northern part of the reservation, near an Indian agency at Meeker; the Uncompahgre Utes inhabited the central area, and the Southern Utes, the southern tier. The reservation was undivided, however, and agreements about it were made with the Confederated Band as a whole. The treaty provided that a three-fourths vote of the male members of the entire Band was required to ratify any change in its terms. 15 Stat. 622.

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[1] The Southern Utes, themselves, are composed of constituent bands. During most of the time relevant here, there were three such bands—the Moache, the Capote and the Weeminuche—and congressional references to the Southern Utes invariably mean all three. The Weeminuche (also known as the Ute Mountain Utes) live to the west of the Moache and Capote, however, in lands not subject to the disputes in this case, and only the latter two bands brought this action as "the Southern Ute Tribe or Band." The government sought dismissal below for failure to join the Weeminuche, allegedly an interested party. See n. 13, *infra*. The Court of Claims' rejection of that contention, App. 89, was not challenged in the government's petition for certiorari.

One such change occurred in 1874, after gold had been found in the east-central part of the reservation. For a stated consideration, which was not promptly paid,[2] the Confederated Band ceded back approximately one fourth of the reservation. Act of April 29, 1874, 18 Stat. 36. The effect of this cession was to isolate the Southern Utes somewhat from the other tribes. It left a strip of reservation fifteen miles wide along the southern boundary and a strip twenty miles wide along the western boundary joining the southern strip to the much larger northern area. In 1896, the southern strip was identified as Area 617 and the northern part as Area 616 on a map of Indian land cessions drawn by Charles Royce in connection with a published study, *Indian Land Cessions,* 18th Ann. Rep., B.A.E. 1896–1897, Part II, and the areas are frequently referred to in the opinions and papers in this case as Royce Area 617 and 616. No such areas were created by or referred to in the Act of 1874, however; it was an agreement with the Confederated Band as a whole, and dealt with the whole of their reservation.

In 1879, whether because of impatience with promises not kept, incursions by settlers and miners into their reservation, or the farming of land they wanted for horse-pasture, the Utes went to war in the northern part of the reservation, massacring the male inhabitants of the Meeker agency. This produced a great

[2] This cession was the subject of a claim before the Indian Claims Commission, *Confederated Bands of Ute Indians* v. *United States*, 11 Ind. Cl. Comm. 180 (1962), and resulted in a new judgment, after offsets, of $7,908,586.16. (14 Ind. Cl. Comm. 679, 705 (1965)).

outcry in the United States and—together with the pressure for land and a general impatience with "solutions" to the Indian problem which sought to give Indians enough land to remain in their aboriginal state—led to the proposal by the United States of an agreement to eliminate, completely, the existing reservation, See, *e.g.*, 10 Cong. Rec. 2027–2030, 2058–2067, 2121–2130. The northern, White River Utes, believed chiefly responsible for the massacre, were to be moved to agricultural lands in an existing reservation in Utah. The Uncompahgres were to settle on agricultural lands at the junction of the Gunnison and Colorado (then called the Grand) Rivers in Colorado, or in Utah if there was not enough land at that location. The Southern Utes were to settle upon agricultural lands on the La Plata River, which ran southward through the western part of their area of the reservation, either in the former reservation or in New Mexico if reservation lands proved insufficient.

It was central to the new scheme that none of this land was to be held triballly; it was all to be allotted in severalty to individual Indians. The Utes were to agree "to cede to the United States all the territory of the present Ute Reservation in Colorado, except as [thus] provided for their settlement." (21 Stat. 200) Once the allotments for settlement were made, "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed to the United States,* shall be held and deemed to be public lands of the United States and subject to disposal"

under conditions promising financial benefit to the Utes. (21 Stat. 203; emphasis added.)

This was, essentially, a forced sale of the reservation; it was adopted by the United States by the Act of June 15, 1880, 21 Stat. 199. The United States' failure thereafter to observe the terms on which the Utes sold the reservation has been the cause of the several lawsuits brought by the Confederated Band. But it was clear until the present suit that the Southern Utes were not specially treated by the agreement and Act. As one of the Confederated Band, they ceded the reservation to the United States in return for the promise (a) of allotment of agricultural lands to individual members of the tribe, in severalty; (b) a share in the proceeds of any former reservation lands thereafter sold to the public; and (c) the fixed annuities established or continued by the Act. Throughout the lengthy and heated debates over the measure[3]—strongly resisted by those who knew that the Indians were not ready for settled, agricultural life and viewed the measure as excessively punitive—there is no hint that the Southern Utes were being treated differently in this regard, that there was more than one Ute Reservation, or that any of the Utes would be permitted a reservation life thereafter.

The Act called for restoration of the reservation lands to public land status *after* the required allotments in severalty had been made. By 1882 the White

[3] The Senate debates are set out at 10 Cong. Rec. 2027–2030, 2058–2067, 2121–2130, 2152–2164, 2189–2202, 2221–2228, 2249–2268, 2300–2320; the House debates, at 10 Cong. Rec. 4251–4263; see also 10 Cong. Rec. 176–185.

River Utes had been moved to Utah and, when no suitable lands could be found at the mouth of the Gunnison and a new uprising threatened, the Uncompahgre Utes had also been taken there. The northern part of the former reservation was thus vacant, and no longer subject to the necessity of allotment. In order to open it to public entry while reserving the southern part of the former reservation for the allotments to individual Southern Utes that had not yet been made, Congress enacted the Act of July 28, 1882, 22 Stat. 178. The Act provided for the surveying of a line dividing the southern from the northern part of the former reservation, and opened the latter to immediate settlement. Nothing in the scanty debates and reports regarding the measure suggests any new purpose to give the Southern Utes a reservation or to recognize that they continued to possess one. 13 Cong. Rec. 1659 (1882); S. Rep. No. 186, 47th Cong., 1st Sess.; H. Rep. Nos. 561, 1304, 47th Cong. 1st Sess.

Over time, as the Southern Utes continued to resist taking individual allotments, it became apparent that they were not, indeed, ready for the settled agricultural life contemplated by the Act of 1880. In 1888, 25 Stat. 133, the Secretary of the Interior was authorized to appoint a commission to negotiate with the Southern Utes for a modification of the 1880 agreement. The Tribe agreed to give up its rights in its former reservation to remove and settle upon a reservation in Utah. In 1895, however, Congress annulled this agreement (which had never been ratified) in a statute, the Act of February 20, 1895, 28 Stat.

677, which expressly required that "the [Act of June 15, 1880] be carried out as therein provided, and as further provided by general laws for settling Indians in severalty." The House Report on the measure, No. 799, 53d Cong., 2d Sess., explained that it was intended to remedy the Indians' "anomalous condition of having ceded their reservation and yet remaining upon it." At 2; see also, S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4.

The 1895 Act created, for the first time, a Southern Ute Reservation. It was located in the western part of their former area and a small adjoining area of northern New Mexico. Agricultural lands might be allotted to individual Utes from the remainder of the former area—but not, as previously, to all members of the tribe; agricultural lands were to be allotted only to those whom the Secretary considered qualified, and they retained their rights in the western, tribal lands. All allotments were to be made within six months, and land neither allotted nor set aside in the newly created reservation was to be sold for the benefit of the tribe. Although all previous Acts had honored the provision of the 1868 Treaty requiring three-fourths approval by the male members of the Confederated Band, and all prior changes had received such approval, this Act provided for approval by only a majority of the members of the Southern Ute Tribe or Band. 28 Stat. 679.

The allotment impass which had followed the 1880 Act was thus brought to an end, and much of the land which had previously been expected to become

public lands in fact became so. Little was purchased, however, and when in 1938 the unoccupied public lands in the southern strip were returned to tribal ownership, a substantial proportion of the pre-1880 reservation Southern Ute lands was restored.

B. LITIGATION TO ENFORCE THE GOVERNMENT'S OBLIGATIONS TO THE CONFEDERATED BAND

Although both the Act of 1880 and the Act of 1895 provided specifically that the lands of the former Ute Reservation were to be sold for the benefit of the Utes, Congress opened the land to free homesteading, and the government in other respects failed to protect the Indians' rights. Later concern for these failures led to the passage of a number of special acts permitting the Confederated Band and its constituent tribes to sue the government for damages. Several actions were filed, and in all of them, until the present suit, both the attorneys for the Indians and the courts involved viewed the 1880 Act as having ceded the entire Ute Reservation then existing. Accordingly, the Southern Utes—who had resided almost exclusively in the southern strip—were parties to those suits and shared in the judgments obtained.

The first such action was brought by the Confederated Band in 1910. *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. It included claims for the fifteen-mile wide southern strip as well as for the remainder of the reservation, and approximately 5 percent of the 3.4 million dollar judgment obtained represented payment for those claims. The Southern Utes were party to that litigation as one of the Confederated Band; the court

agreed with their contention that the claims for southern strip lands could be heard, although the jurisdictional act referred only to the Act of 1880, because the lands covered by the Act of 1895 are also embraced within the cession of 1880 (App. 110). By the Act of 1880, the court said, the Confederated Band "ceded to the United States the entire remainder of their reservation" after the prescribed allotments in severalty were made. 45 Ct. Claims at 459.

The Confederated Band was before the Court of Claims again in 1943, this time with regard only to lands from the northern area of their former reservation. *Confederated Bands of Ute Indians* v. *United States,* 100 Ct. Claims 413. Again, the Act of 1880 was regarded as having ceded the entire Ute Reservation, after individual allotments, to the United States. *Id.* at 421.

In 1946, the Confederated Band brought another claim before this Court. *Confederated Bands of Ute Indians* v. *United States,* 330 U.S. 169. It was represented in that case by the present counsel for the Southern Utes, and the Southern Utes were a party. Counsel alleged in the Band's complaint and emphatically and repeatedly stressed in this Court that the Act of 1880 had ceded to the government *all* the Band's Colorado lands with the exception of agricultural lands for individual allotment under that Act. No. 141, O.T., 1946, R. 3 (complaint); Pet. 4, 6–7; Pet. Br. 8–9, 15–16, esp. n. 4, 23, 24 n. 6. In the Act of 1880, counsel said, the "parties were dealing with respect to the total lands that the Indians then

possessed." Pet. Rep. Br. 8. These repeated remarks were made in another context, to be sure, but that does not detract from their pertinence as an understanding of what the Act of 1880 had done. The government acknowledged their correctness, Resp. Br. 13, 34–35, 37–38, and so did this Court. 330 U.S. at 174.

Just one year earlier, in 1945, present counsel had filed still another suit on behalf of the Confederated Band against the government for its failure to honor its obligations under the Act of 1880. This Court noted that it was conceded that the 1945 suit, already filed, presented the Band's claims for the entire area of their prior reservation. 330 U.S. at 175, 176. As Chief Judge Cowen points out in his dissent below in this case, App. 125–126, 127–129, the Band's 1945 complaint again acknowledged that the whole of the previous Ute reservation had been ceded to the government by the Act of 1880 (save for such lands as might be individually allotted), and the allegations of the complaint were broad enough to include the lands in issue here. The Southern Utes, whose interest was then and is now restricted to the lands in issue here, were party to that suit and took a forty percent share of the judgment. As Judge Skelton points out in his dissent below, App. 105, the accountings which formed the basis for settlement of the 1945 suit included moneys arising from the lands in issue here.

The Confederated Band of Ute Indians, including the Southern Utes, settled the 1945 suit, together with several others, for an aggregate judgment of almost thirty-two million dollars. The settlement agreement included a schedule of lands drawn up by the Band's

attorneys (App. 99; 117 Ct. Cl. 433, 437), and expressly provided:

> So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata,* not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes.

The Southern Utes, along with the other tribes, thus released and settled any claims they might have had to lands in western Colorado, insofar as those lands were ceded to the government by the Act of June 15, 1880. The settlement was approved and adopted by the Court of Claims. 117 Ct. Cl. 433. Again, in 1951, in a suit to determine present counsel's fee for its services in the actions resulting in this consent decree, the Court of Claims made plain its understanding, on which it had approved the previous settlements: "In 1880 the Indians ceded to the United States the remainder of the reservation, containing 12,000,000 acres."[4] *Confederated Bands of Ute Indians* v. *United States,* 120 Ct. Cl. 609, 623.

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[4] The original reservation was less than 16,000,000 acres; the withdrawal of 1874 had been of 3,700,000 acres. Thus, the 12,000,000 acre figure necessarily includes the 1,000,000 acre southern strip.

II. THE PRESENT LITIGATION

On August 10, 1951, the two tribes styling themselves the Southern Ute Tribe or Band, see n. 1 *supra*, filed the present claim before the Indian Claims Commission under the Indian Claims Commission Act of 1946. They sought recovery on two bases: damages or compensation for disposition as "free homesteads" of approximately 220,000 acres which both the Act of 1880 and the Act of 1895 obligated the Secretary of the Interior to sell for the Indians' benefit; and damages for failure to account for the proceeds from the sale of approximately 82,000 acres—proceeds which, again, under both statutes were to be held for the Indians' benefit. The government answered, *inter alia*, that these were lands "formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880," and that thus any claim as to them had been compromised by the 1950 settlement.

On August 13, 1951, three days after these claims were filed, the statutory time limit for filing new claims with the Commission finally expired. 25 U.S.C. 70k. In 1953, in response to the Tribe's request for an accounting for the proceeds from sale of approximately 82,000 acres of land, the government presented to the attorneys for the Tribe a General Accounting Office report which included a statement of proceeds derived from the sale of certain lands pursuant to the Act of 1895, together with an accounting of the interest on these proceeds during the period from February 12, 1929, to June 30, 1951. On June 12,

1963, the Tribe filed "exceptions" to the accounting report; on September 30, 1963, it filed amended "exceptions" in which, for the first time, the Tribe alleged an accounting claim directed to tribal funds generally, including matters unrelated to the original claims filed in 1951, and demanded an extension of the accounting report "up to date." 17 Ind. Cl. Comm. 53 (App. 19–20, 22, 45–46).

On May 6, 1966, the Indian Claims Commission rendered its findings of fact and opinion, 17 Ind. Cl. Comm. 28 (App. 24), in which it held that the government was liable to the Tribe for "just compensation" for 230,547.44 acres of land disposed of from its reservation without the payment of compensation, and further held that the Tribe was entitled to a general accounting and that the accounting should be brought up to date. On March 20, 1970, the Court of Claims affirmed (Chief Judge Cowen and Judge Skelton dissenting), 423 F. 2d. 346 (App. 68).

With respect to the effect of the 1950 consent decree, both the Commission and the Court of Claims concluded that the lands in question here were not "effectively" ceded in 1880—although apparently so—and that the settlement agreement was limited to those lands "effectively" ceded rather than all lands identified as ceded by the Act (App. 88). Thus, they rejected the government's *res judicata* defense. As to the accounting claim, the Commission held that the limitations period did not begin to run until the Indians received the accounting report,

since they could not have known until then whether they had any claim (App. 46). The Court of Claims agreed that the request for a general accounting was timely, but on the ground that the "exceptions" were merely amendments which related back to the filing of the original claim (App. 95).

SUMMARY OF ARGUMENT

I

All claims in this case are *res judicata*. They were the subject of a settlement reached between the government and the Confederated Band of Ute Indians, including the Southern Ute Tribe or Band of Indians, in 1950. The settlement agreement stated in terms that the judgment to be entered upon it would be "res judicata * * * as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880." The lands which are the subject of this law suit are among the lands that were ceded to the United States by the Confederated Band of Ute Indians by the Act of June 15, 1880.

As a historical matter, that cession could not be denied. It appears in the language of the Act, and throughout the heated legislative debates. At the time, there was only a single Ute Reservation, and under the terms of the statute all of it was to be ceded to the United States except those lands, not exceeding 700,000 acres in extent, which might be allotted in severalty to individual Indians for agricultural use. The tribal lands were to be entirely extinguished.

The cession of 1880 was the only effective cession of these lands. While a subsequent Act, the Act of 1895, revised the terms of the agreement somewhat and created for the first time a Southern Ute Reservation, that Act neither purported to nor could effect any cession of these lands. The conditions required by a previous treaty for cession were not met; the legislative history of the 1895 Act specifically recognizes the previous cession as having been made, and indicates that the statute was intended to remedy the anomalous situation which resulted when the Southern Utes nonetheless remained on the reservation; and the Act itself is styled as one "to carry out the provisions of the treaty" of 1880 and includes no words of cession.

Nor could it be believed that in 1950 counsel would have thought that a reference to land "ceded to defendant by the Act of June 15, 1880," would not be taken to include the land at issue in this case. Until this suit was filed, three days before the closing of the Indian Claims' Commission docket, both the courts and concerned attorneys were unanimous that the Act of 1880 had ceded the whole of the Ute Reservation, including these lands. In 1947, present counsel for the Southern Utes, who also represented the Confederated Band in the settlement negotiations, had repeatedly and emphatically stated to this Court that the 1880 cession was a cession of the entire Ute Reservation; and this Court had responded by noting that the litigation which resulted in the 1950 settlement, then pending in the Court of Claims, sought to settle

all claims for lands contained within the true boundaries of the prior reservation. In light of all this, it was improper to go behind the plain words of the settlement agreement to find that the parties had nonetheless meant to exclude these lands from the stipulation. The lands were ceded to the United States in 1880, and thus the judgment of 1950 is *res judicata* as to them.

II

A. The jurisdiction of the Indian Claims Commission is limited to claims filed on or before August 13, 1951. Insofar as it demanded an accounting for tribal funds, the petition of the Southern Ute Tribe filed before that date was limited to the proceeds from the sale of 82,000 acres of land. Accordingly, the exceptions subsequently filed seeking an accounting of other funds—notably, a tribal fund called "Proceeds of Labor"—are untimely and ought not to have been entertained. The time limitation of the statute is jurisdictional, since the Act is a waiver of sovereign immunity. Moreover, it is clear from the legislative history both of the Act and of subsequent extensions that that limitation is one which Congress has particularly insisted upon.

Nor can it properly be said that a claim for an accounting on the "Proceeds of Labor" fund relates back to the claim for an accounting of the proceeds from the sale of 82,000 acres of land. Whether or not the claim was suggested by the accounting the government made in response to the initial request—an accounting made in 1953, 10 years before the filing of these exceptions—the claim was in no way suggested

by what the Band had demanded before the running of the period of limitation. Only the latter consideration could be the test of whether respondent's new claims relate back to its earlier finding.

B. Similarly, the authority of the Indian Claims Commission is limited to claims accruing before August 13, 1946. In response to the demand for an accounting, the government in fact filed an accounting up to June 30, 1951, as has been its invariable practice in these cases. But respondent by exception has now demanded an extension of that accounting down to the present. An accounting for the government's handling of respondent's money during the period 1951–1970 cannot be thought even remotely connected to claims which may have accrued before 1946. The purpose of an accounting is not simply to provide an appropriate remedy for wrongs which may have been done at an earlier time, but to expose additional mishandling of funds. Under the statute, jurisdiction over any government mismanagement of tribal funds after August 13, 1946, is exclusively in the Court of Claims.

ARGUMENT

I. ALL CLAIMS IN THIS CASE ARE BARRED AS *RES JUDICATA* SINCE THEY RELATE TO LAND "FORMERLY OWNED OR CLAIMED BY [THE CONFEDERATED BAND OF UTES] IN WESTERN COLORADO, CEDED TO THE DEFENDANT BY THE ACT OF JUNE 15, 1880," AND THUS WERE SUBJECT TO A FINAL SETTLEMENT, TO WHICH RESPONDENT WAS A PARTY, MADE IN 1950

Respondent was a party to consent judgments entered on July 13, 1950, for an aggregate of more than thirty million dollars in settlement of various

claims made by the Confederated Band of Ute Indians. 117 Ct. Cl. 433. The tribes constituting the Southern Ute Band, as it was known in 1880 and 1895, see n. 1 *supra,* received forty per cent of those judgments. One of the settlement agreements, for more than six million dollars, recites (App. 99) *inter alia,* that—

> the judgment to be entered in this case is res judicata, not only as to the land described in [a schedule prepared by counsel for the Confederated Band], but whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant * * * sold for cash, disposed of as free homesteads and set aside for public purposes. * * *

The Court of Claims held in the present case that this settlement included no amounts attributable to the southern strip of the former Ute Reservation and was not *res judicata* as to claims regarding lands in that strip, because those lands were not "ceded to defendant by the Act of June 15, 1880."

A. THE ENTIRE UTE RESERVATION, INCLUDING ITS SOUTHERN PART, WAS "CEDED TO DEFENDANT BY THE ACT OF JUNE 15, 1880"

We have set out in some detail in the Statement, *supra,* pp. 4–10, a history of the Ute Reservation. Without repeating that history here, it should be evident that the Act of 1880 involved a cession of the entire Ute Reservation to the United States. There was but a single, undifferentiated Ute Reservation at the time, and the Act nowhere indicates that one part of it

might be continued in reservation status. The only lands which were not to be ceded under the Act were those lands—not possibly more than 700,000 acres in extent for the *whole* of the Confederated Band, H. Rep. No. 1401, 46th Cong., 2d Sess. 7; 10 Cong. Rec. 2066—which were to be allotted to *individual* Ute Indians in severalty for agricultural purposes. The plain purpose of the bitterly fought Act, and in large part the reason for the disputation over it, was to end reservation life for the Utes. Tribal lands were to be completely extinguished.

In indicating where the allotments were to be made, Congress distinguished among the several tribes. The White River Utes, believed principally responsible for the massacre at Meeker, were to be banished to Utah; the Uncompahgre might have their allotments within the former reservation, at the mouth of the Gunnison, if there was sufficient land; and the Southern Utes were to receive their allotments along the La Plata River in Colorado and New Mexico. But, again, these allotments were restricted to homestead size and to individual Indians; no one suggested that the Southern Utes would be able to preserve the entire southern strip of the reservation under a different name. Indeed, the legislative history suggests a belief that few of them would remain in Colorado, as the La Plata in that state is a small stream with only limited agricultural lands beside it. H. Rep. No. 1401, *supra,* 9. The Senate would have sent them all to New Mexico; the House would have had them all remain in Colorado; and the compromise reached was that they would stay by the La Plata in Colorado

if there proved to be enough agricultural land for allotment there. 10 Cong. Rec. 4465.

The Act provided that allotments were to be made before public sales of the land began. Once the northern areas of the former reservation had been vacated by the removal of the White River and Uncompahgre Utes, ending any need for allotments there, there was pressure to open those lands up, while preserving the southern part for the allotments which had not yet occurred. It was this pressure that led to the Act of 1882, providing for the surveying of a line between the two areas. No one suggested that the southern area had not also been ceded; the legislative history is all to the contrary. As a practical matter a distinction had to be made in order to know which lands had to be preserved against the continuing possibility of allotment to the Southern Utes under the 1880 Act. H. Rep. No. 799, 53d Cong., 2d Sess. 2; S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4.

B. THE SOUTHERN PART OF THE UTE RESERVATION WAS EFFECTIVELY CEDED TO THE UNITED STATES BY THE ACT OF JUNE 15, 1880

Recognizing the inevitability of the conclusion that the Confederated Band ceded the southern strip along with the rest of its reservation in 1880, the Court of Claims concluded that that cession had not been "effective." To the contrary, it was the only effective cession there was.

When the Ute Reservation was created by treaty in 1868, it was expressly required that any change in the Reservation, such as a cession, must be approved by three fourths of the males of the entire Confed-

erated Band. The cession of 1880 was so approved, and thus was effective as a change of the prior agreement. The Act of 1895, which the court below viewed as being the "effective" cession (App. 85), contained no such provision for approval. It provided only for approval of the changes it introduced by a majority of the males, of the Southern Utes only (*supra*, p. 9). While we view the resulting changes as valid, because they improved the position of the Southern Utes from what it had been under the Act of 1880, those changes could not have been a valid cession of the Band's treaty reservation lands.

Indeed, the form of the statute and its legislative history, on the whole, support the conclusion that in the Act of 1895 Congress started from the proposition that an effective cession of the reservation lands had been made in 1880. The committee reports in both the House and the Senate characterize the 1880 agreement as one in which the Confederated Band "ceded the whole of their reservation in Colorado to the United States, except such lands, if any, as might be allotted to them in severalty." H. Rep. No. 799, 53d Cong. 2d Sess., 2; S. Rep. No. 279, 53d Cong., 2d Sess., 2. Observing that allotments had never been made to the Southern Utes and that in fact they did not want them—being uninterested in agriculture and unwilling to break with tribal ownership patterns—the reports recommended the creation of a new reservation, embodying lands more extensive than would have been possessed by the tribe as a whole had the allotments been made, while still permitting allotments to those who wished to, and would, engage in farming. The

Southern Utes were said to be "in the anomalous condition of having ceded their reservation and yet remaining on it." *Ibid.*

Accordingly, the Act of 1895 was styled as one "to carry out the provisions of the treaty" of 1880, and in its opening words directs that that treaty "be carried out." 28 Stat. 677. Definite time limits were then placed, for the first time, on the making of allotments and the United States dedicated some of its lands—which it could be assumed would have reverted to public ownership after the making of allotments under the Act of 1880—to the creation of a new reservation for those who did not receive allotments. The Act nowhere states that the Southern Utes made any cession thereby; and, indeed, for the reasons stated, they had no land to cede. They had remained on the former reservation for fifteen years during the allotment impass, but without any rights of tribal ownership. That impass was now broken in reliance on, not in derogation of, the cession made under the Act of 1880.

C. THE COURTS, GOVERNMENT COUNSEL AND INDIAN COUNSEL HAVE CONSISTENTLY UNDERSTOOD AND STATED THAT THE ACT OF 1880 CEDED THE ENTIRE UTE RESERVATION AS IT THEN EXISTED

The Court of Claims appeared to act upon the hypothesis that reasonable men might not have thought that in referring to the Act of 1880 the settlement agreement included a reference to the southernmost part of the then Ute Reservation. But until this lawsuit was filed, three days before the closing of the Indian Claims Commission docket, both the courts and concerned attorneys were unanimous that the Act of

1880 worked a cession of the whole of the Ute Reservation.

The various occasions on which such statements were made, including to this Court, are set out at length in the Statement, *supra*, pp. 10–13. Not all of them were mere *dicta*: in 1910, there was an award of more than $170,000, out of a total judgment of $3,400,000, attributable to Southern Ute lands. *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. And in 1947 in this Court, with counsel on both sides essentially the same as those who later reached settlement in 1950, it was said that—

> except for certain treaty lands not at issue here, *litigation concerning which is now pending in the Court of Claims*, the *only* lands in Colorado for which the Indians have not been paid are those to the north of and outside the 1868 treaty reservation * * *.
>
> * * * * *
>
> It is conceded that petitioners [the Confederated Band] have either been, or are currently pressing litigation in the Court of Claims by which they seek to be, compensated for the White River Valley Lands, and, in fact, *for all of the land which was contained in the true boundaries of the 1868 reservation.* * * *

Confederated Bands of Ute Indians v. *United States*, 330 U.S. 169, 175, 176. (Emphasis added.) The litigation referred to, of course, is that which was settled in 1950 in the language whose meaning is at issue here. Counsel's repeated insistence in this Court in 1947 that the Act of 1880 ceded the entire Ute Reser-

vation has already been noted, and was part of the *factum* against which the settlement agreement was reached. *Supra,* pp. 11–12.

D. SINCE THE MEANING OF THE REFERENCE TO THE ACT OF 1880 WAS CLEAR AND REASONABLE IN LIGHT OF PAST STATEMENTS BY COUNSEL AND THE COURTS, IT WAS IMPROPER TO ENTERTAIN PAROLE EVIDENCE TO SHOW A DIFFERENT MEANING

If one begins, as is proper, by asking how government counsel could have assured himself that the 1950 settlement agreement brought an end to litigation over the government's obligations regarding the former Ute Reservation, it is difficult to disagree with Judge Skelton, dissenting below, that "a more clear, a more precise, a more final disposal and release of claims" than that signed in 1950 could not readily be imagined (App. 99). The judgment's reference to "land * * * ceded to defendant by the Act of June 15, 1880," particularly in the context of the settled understanding of that act which had arisen between the same parties and counsel in prior litigation, is too clear to admit of doubt as to the parties' intent. Consequently, all elements of the claims made in this case are barred by *res judicata*; for the 1950 judgment is not subject to collateral attack save for lack of actual consent or fraud in the procurement, and bars all further litigation concerning the identified lands. *Swift & Co.* v. *United States,* 276 U.S. 311, 324; *Commissioner* v. *Sunnen,* 333 U.S. 591; *Cromwell* v. *County of Sac,* 94 U.S. 351.[5]

[5] The fact that this is a consent judgment, rather than a contested one, does not alter the result, *Swift & Co.* v. *United States, supra; United States* v. *Swift & Co.,* 286 U.S. 106; *Rector* v. *Suncrest Lumber Co.,* 52 F. 2d 946 (C.A. 4).

When the *res judicata* argument was first made to the Court of Claims, it remanded the matter to the Commission to "get a better idea of exactly what the parties meant to stipulate in 1950, namely what they *then* thought was ceded by the Act of 1880" (App. 86). The Tribe introduced the testimony of Ernest Wilkinson, who was the attorney in the previous litigation and who signed the stipulation of settlement, not only in Case No. 46640, but in all of these cases. The government offered no evidence, on the theory that a stipulated judgment could not be impeached by parol evidence. The majority opinion of the court seemed to take great offense because the government refused to open its files to Mr. Sonosky, the former attorney with the Department of Justice who handled the *Ute* cases and settlement, "for the purpose of refresh[ing] his memory" (App. 87). Because of this refusal, the majority concluded: "We think we are justified in inferring that neither party intended the stipulation to apply to [the southern strip of the reservation]" (App. 88).

Not only the conclusion, but the entire inquiry was unwarranted. There was no suggestion, and no finding, that the language in question had been procured by fraud, or had not actually been consented to. See *Swift & Co.* v. *United States, supra.* The judgment based on the stipulation was the act of the court, and has the same force and effect as all judgments. *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States,* 113 U.S. 261; *National Labor Relations Board* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318, 323.

> * * * Plaintiffs cannot be allowed a showing that defendant intended to acquire something less than what the judicial records establish. It is well settled that parol or extrinsic evidence is inadmissible, in a collateral proceeding, to vary or contradict judicial records, orders or decrees. *Hill* v. *Wampler,* 298 U.S. 460 (1936); *In Re Union League Club of Chicago,* 203 F. 2d 381 (1953); *In Re Crosby Stores,* 65 F. 2d 360 (1933).

Lillie H. Mason, et al. v. *United States,* 144 Ct. Cl. 579, 583–584; see, also, *Utah Power & Light Co.* v. *United States,* 70 Ct. Cl. 391, 397–398.

Nor was it proper to approach the stipulation, as the court did, looking to find a tortuous route around its primary and long-accepted reference.

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. Here was a contract involving three millions of dollars, and after the work was done, the vessel delivered and accepted and this release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters. * * *

United States v. *Wm. Cramp & Sons Co.,* 206 U.S. 118, 128. As the Court of Claims itself has recognized,

> * * * A claim not specifically delineated in an exception to a release is hereafter barred.

H.L.C. & Associates Constr. Co. v. *United States,* 176 Ct. Cl. 285, 290–95, 367 F. 2d 586, 588–93 (1966); *Utah Constr. & Mining Co.* v. *United States,* 168 Ct. Cl. 522, 535, 339 F. 2d 606, 614, (1914), *rev'd on other grounds,* 384 U.S. 394 (1966).

John G. Vann v. *The United States,* 190 Ct. Cl. 546, 555. And so it is here. Had the parties intended to leave out of any settlement a claim for some 230,000 acres of land, the stipulation would have said so.[6]

II. TO THE EXTENT RESPONDENT'S EXCEPTIONS TO THE GOVERNMENT'S ACCOUNTING FOR FUNDS DERIVED FROM THE SALE OF 82,000 ACRES OF LAND SEEK AN ACCOUNTING FOR OTHER FUNDS, OR FOR THE GOVERNMENT'S FISCAL CONDUCT AFTER AUGUST 13, 1946, ITS EXCEPTIONS ARE BARRED BY THE JURISDICTIONAL LIMITATIONS ON THE AUTHORITY OF THE INDIAN CLAIMS COMMISSION

The Tribe's petition before the Indian Claims Commission, filed only three days before the deadline established by the Commission's governing statute,

[6] During the past 20 years, the government has made full and complete settlements with Indian Tribes under the Indian Claims Commission Act in 91 cases, for an aggregate consideration of $181,533,833.33, all of which have received the approval of the Indian Claims Commission as required by Section 15 of that Act (25 U.S.C. 70n), and are entered as judgments against the United States. If these stipulated judgments may be upset in some future proceeding, because the attorney for the Tribe says that he did not "intend" to include a particular claim in the settlement, the whole procedure for settlement of Indian claims which Congress has established will be seriously jeopardized.

made only one, limited claim for an accounting. It sought a proper accounting for the funds received by the United States from the disposal of approximately 82,000 acres of land (App. 12–13). The government supplied such an accounting, current to 1951, in February 1953. Ten years later, however, twelve years after the Commission's authority to entertain new claims had lapsed, the Tribe sought by belated exceptions to the accounting to expand the government's accounting obligation in two respects: first, by raising accounting claims unrelated to the 82,000 acres referred to in the original petition; second, by requiring the accounting to be brought up to date from 1951, the terminal date. By permitting both exceptions, the Court of Claims and the Commission radically expanded the Commission's authority, in plain derogation of Congress' will.

Since its inception in 1946, it has been plain that the Indian Claims Commission is a body of sharply limited jurisdictional authority. It is permitted to entertain only claims "existing" before August 13, 1946; all subsequent claims are within the original jurisdiction of the Court of Claims. 25 U.S.C. 70a; 28 U.S.C. 1505. And it is permitted to entertain only claims which were the subject of a complaint filed on or before August 13, 1951. 25 U.S.C. 70k. The holdings below honor neither restriction.

A. THE CLAIM FOR AN ACCOUNTING OF TRIBAL FUNDS UNRELATED TO THE 82,000 ACRES REFERRED TO IN THE ORIGINAL PETITION IS UNTIMELY

The government contended below, and both the Commission and the Court of Claims appear to have

agreed, that respondent's exceptions to the government's accounting sought an accounting (and consequent payment of damages) for funds unrelated to the 82,000 acres of land on which the claim for accounting in respondent's complaint was based. For example, amended Exception 8, filed on September 30, 1963, states (App. 22):

> 8. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: Indian moneys, Proceeds of Labor, Southern Ute Indians, and to the failure to show the amount of money lost to petitioner through the failure to credit interest as required by law.

The text and a footnote explain that counsel for respondent had discovered this fund more or less by chance in the course of other litigation. There is no suggestion that it relates to the funds derived from the 82,000 acres which were the only subject of the original demand for an accounting. And, indeed, funds in a "Proceeds of Labor" account could not ordinarily be expected to have been derived from the government's sale of land.[1]

[1] Such a fund would ordinarily contain the proceeds of any products made, harvested, or otherwise produced and then sold from the reservation. So far as respondent's exceptions concern the fund called "Proceeds of Southern Ute Reservation," matters are more complicated. That is a general fund which contains tribal funds in addition to the proceeds of the 82,000 acres, and is not segregated. Strictly speaking, respondents are entitled to recover by their exceptions only that proportion of any mishandling shown by the accounting as is attributable to the proceeds of the 82,000 acres specified. That issue, however, is one this Court need not decide; we urge here only that

Nothing prevented the Tribe from seeking a general accounting from the government when it filed its original petition in 1951. This is not a case involving inexperienced lawyers who might have "overlooked" the matter, nor was it a case of lawyers unfamiliar with Ute affairs. The attorneys presently representing the Utes are the same ones who previously and successfully represented the Confederated Utes (including the Southern Utes) in securing four judgments for that Tribe aggregating almost 32 million dollars in 1950 (App. 97). It should be assumed, therefore, that their action in seeking only an accounting for a specific item was knowledgeable and deliberate.

But the authority of the Indian Claims Commission to entertain a new demand for an accounting expired on August 13, 1951, twelve years before this "exception" was filed. 25 U.S.C. 70k. The limitation of Section 70k is jurisdictional, since the Act is a waiver of sovereign immunity. As in the case of the Tucker Act, 28 U.S.C. 1346, 2401, 2501, limitations on the time for filing suit under a waiver of sovereign immunity are jurisdictional in nature. "The United States, as sovereign, is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. See also, *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; *Soriano* v. *United States*, 352 U.S. 270; *Edwards*

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the expansive reading of the relation[illegible]ck theory be rejected, and the case remanded for further proceedings in which such questions may be examined, and the precise identification of any exceptions which do properly relate back may occur.

v. *United States*, 163 F. 2d 268 (C.A. 9); *Powers* v. *United States*, 390 F. 2d 602 (C.A. 9); *Hamman* v. *United States*, 399 F. 2d 673 (C.A. 9); *Eastern Freight Ways* v. *United States*, 257 F. 2d 703 (C.A. 2); *Mulholland* v. *United States*, 361 F. 2d 237 (Ct. Cl.); *Todd* v. *United States*, 292 F. 2d 841 (Ct. Cl.). It follows that the court erred in directing the accounting for such claims to be made.

It is quite clear from the legislative history of the Act that Congress was fully aware of the time limitation for filing claims and adopted it knowingly and intentionally. From the first bill introduced in 1930, throughout all successive stages of the legislation, the period for filing claims was always five years.[8]

At hearings on H.R. 1198 and 1341, 79th Congress, which were the forerunners of H.R. 4497, the eventual Indian Claims Commission Act, the House Committee

[8] The legislative history of the Indian Claims Commission Act has been compiled in convenient form in *Legislative Material on the Indian Claims Commission Act of 1946* by Alice Ehrenfeld associated with Riegelman, Strasser, Schwarz and Spiegelberg, and Robert W. Barker, associated with Ernest L. Wilkinson. It will be cited as *Legislative Material*.

H.R. 7963, 71st Cong., 2d Sess., Jan. 6, 1930, sec. 4(f), (*Legislative Material*, 15); H.R. 6655, 74th Cong., 1st Sess., sec. 4 (*id.*, 68); S. 2731, 74th Cong., 1st Sess., sec. 4 (*id.*, 104); S. 1902, 75th Cong., 1st Sess., sec. 4 (*id.*, 147); H.R. 5817, 75th Cong., 1st Sess., sec. 4 (*id.*, 206); S. 4206, 76th Cong., 3d Sess., sec. 4 (*id.*, 336); S. 4234, 76th Cong., 3d Sess., sec. 13 (*id.*, 347); S. 4349, 76th Cong., 3d Sess., sec. 13 (*id.*, 365); S. 1111, 77th Cong., 1st Sess., sec. 13 (*id.*, 395); H.R. 4339, 77th Cong., 1st Sess., sec. 13 (*id.*, 430); H.R. 4693, 78th Cong., 2d Sess., sec. 13 (*id.*, 444); H.R. 5569, 78th Cong., 2d Sess., sec. 12 (*id.*, 464); H.R. 1198, 1341, 79th Cong., 1st Sess., sec. 12 (*id.*, 472, 473); H.R. 4497, 79th Cong., 1st Sess., sec. 12 (*id.* 565).

had before it Mr. Lynn Adams, Special Attorney for the Chickasaw Indians, who stated in answer to a question concerning the five-year period: [9]

> Five years from the date of the passage of the Act. There should be some time to force them to come in and present their claims.

When H.R. 1198 was before the House Committee, the Department of the Interior drafted various amendments. One concerned the statutory period for bringing suit. Mr. Felix Cohen, Associate Solicitor, presented the amendments. Interior suggested striking out the words "all claims shall be forever barred; not presented before the end of said five-year period" and substituting: [10]

> No claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be considered by the Congress.

This is the language which finally appeared in the Act.

The Indian Claims Commission made a frontal assault on this language when the propriety of respondent's exceptions was challenged there. It reasoned that since the tribe could not have known of the basis for the exceptions until the government had filed its report in 1953, the limitation period had not begun to run. Such reasoning might have sustained a suit brought in the Court of Claims, which has original jurisdiction over all claims "existing" after August 13,

[9] Hearings, House Committee on Indian Affairs, 1945, p. 9; *Legislative Material*, p. 475.

[10] Hearings, p. 120; *Legislative Material*, p. 530.

1946, since the existence of a claim is sometimes equated with the (reasonable) discovery of it in the law. Even then, the Court of Claims' limitation period of six years might be thought to have run by 1963, when the exceptions were filed. But the theory, admitting the newness of the claim, flies directly in the face of Section 70k, which requires that claims before the Indian Claims Commission must have been filed by 1951.

The Court of Claims disclaimed this "novel rationale" (App. 95), but upheld the "exceptions"—admitting their broader scope—as "amendments" to the petition which, under the Commission's Rule 13(c), would "relate back" to the time of the original filing. While it recognized the limited scope of the original request for an accounting, it found that the government's response indicated an awareness that such a broadening of inquiry was likely, since the response included more information than was required to answer the specific allegations of the petition. (App. 96).

But, as has already been pointed out, if respondent had wished a broader, general accounting their counsel could have demanded one. And there is no justification for the court's conclusion that the government knew all along that such an accounting was required. Indian accounting reports are compiled by accountants in the General Accounting Office. They are not lawyers. They included such information as they thought was necessary to answer the specific demand for an accounting made. They followed a form adopted many years ago and apparently made no

differentiation in this particular case.[11] They included data up to June 30, 1951, as they do in all cases simply because this is the last date for which they have any records. The records for later dates are scattered in the various "Records Centers" throughout the United States. The fact that the report may have included more information than was actually necessary thus did not in any way indicate that "defendant knew from the outset" that it would have to submit information from which a general accounting could be demanded.[12]

The court's application of the "relation back" theory is equally unfounded. Commission Rule 13(c), which permits amended pleadings to relate back to the date of an original filing, is similar to Rule 15(c) of the Federal Rules of Civil Procedure. Interpretations of the latter rule, liberal as it is, have generally agreed that it does not permit the filing of a new and different claim after the running of the statute of limitations. 3 Moore, *Federal Practice* ¶ 15.15, p. 1041 n. 6 and cases cited; Barron & Holtzoff, *Federal Practice and Procedure* § 448 (1960); *L. E. Whitham*

[11] The attorney for the government recognized that the report included extraneous matter and attempted to restrict the report to that necessary to respond to the petition. The court below stated that this attempt was "specious" (App. 96).

[12] It is equally fallacious to suggest, as the court did, that the government's failure to contest the substance of the exceptions "underscores its concession to the obviousness of its fiduciary misconduct disclosed in the report" (App. 96). The government made no response to the "substance" because it contended that the matter of a general accouning was beyond the jurisdiction of the Commission. The Commission recognized this in its opinion, saying, "It should be noted at this point that defendant rested its defense entirely upon other grounds and has not yet answered or contested these exceptions" (App. 47).

Const. Co. v. *Remer*, 105 F. 2d 371, 375–376 (C.A. 10); *Hammond-Knowlton* v. *United States*, 121 F. 2d 192 (C.A. 2), certiorari denied, 314 U.S. 694; *Hartmann* v. *Time*, 64 F. Supp. 671, 680 (E.D. Pa.). To be sure, whether a claim is "new and different' 'is a question of judgment. But here, as in two prior decisions on which the court below relied.[13] the novelty of the issues sought

[13] In *Snoqualmie Tribe* v. *United States*, 178 Ct. Cl. 570, 372 F. 2d 951, the court permitted the petitioner to add a claim on behalf of the Skykomish Tribe of Indians, which had not previously filed a claim with the Commission. The original plaintiffs had relied on a particular treaty as giving rise to their claim; the same treaty, the court reasoned, was at the root of the Skykomish Tribe's claims, and therefore in its view the government had received adequate notice of the "possibility that it might have to defend against a broader claim." 178 Ct. Cl. at 588, 372 F. 2d at 961.

Similarly, in *United States* v. *Northern Paiute Nation*, 183 Ct. Claims 321, 393 F. 2d 786, the Mono Band of Paiute Indians had not subscribed to the Nation's complaint before the Commission within the statutory time. When the Nation sought to amend its complaint in 1958, that was allowed on the basis that the Mono Band was clearly a Northern Paiute tribe. "Therefore the timely petition did include the Monos as a party to the suit." 183 Ct. Cl. at 329; 393 F. 2d at 790.

The inadequacy of the reasoning in these cases is shown, however, in the court's holding with respect to another aspect of the present case. As previously noted (n. 1 *supra*), the "Southern Ute Tribe or Band" in this case excludes a tribe that was consistently treated as a member of the Southern Ute Tribe or Band when the Acts of 1880 and 1895 were passed, the Weeminuche, and the government resisted this action in part on the failure to join that tribe as, in our view, an indispensable party. The Court of Claims ruled against the government on the ground that, since they did not join, the Weeminuche's claim was extinguished on August 13, 1951, when the statute of limitations ran; that tribe then ceased to be indispensable (App. 89). This was a proper application of the statute of limita-

to be added cannot be escaped. The claim for an accounting of a fund identified as "Proceeds of Labor" cannot reasonably be thought to be implicit in a claim limited to a "failure to account for the proceeds from the sale of approximately 81,953.18 acres" (App. 13). Whether or not the claim was suggested by the government's response, or "ignoble confessions," in connection with the accounting it made in 1953—and the lapse of ten years from the filing of the report to the filing of the exceptions makes even that hypothesis untenable—the claim was in no wise suggested by what the Band demanded before the running of the limitations period. Only the latter consideration should be the test of whether respondent's new claims relate back to its earlier filing. Otherwise the Commission's procedural rule would effectively supersede the explicit limitation on its jurisdiction enacted into law by Congress.

Finally, reasonable enforcement of the statute of limitations is particularly called for here, since there can be no doubt of Congress' purpose to bring proceedings before the Indian Claims Commission to a prompt end. The Commission's life was originally limited to ten years. 25 U.S.C. 70v. While this period has been extended in five-year intervals as required, 70 Stat. 624; 75 Stat. 92; 81 Stat. 11, to its present expiration date of April 10, 1972, there is an evident and growing sense of congressional impatience with the slowness with which the Commission's work has

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tions—and completely contrary to the result reached in *Snoqualmie* and *Northern Paiute*. Under those two decisions it would have to be reasoned that a claim on behalf of the Weeminuche could still be made.

been accomplished. The most recent extension was made under threat that no further extensions would be forthcoming, H. Rep. No. 132, 90th Cong., 1st Sess. 3; S. Rep. No. 72, 90th Cong., 1st Sess. 4; H. Conf. Rep. No. 179, 90th Cong., 1st Sess. 4, and included an extraordinary provision threatening forfeiture of Indian claims if the claimants did not proceed to trial on the date set by the Commission for that purpose. 25 U.S.C. (Supp. V) 70v–1(b). In these circumstances, an expansive interpretation of the "relation back" theory to permit belated amendment of claims to raise new issues is particularly inappropriate.

> The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. It did not extend to any cause of action which was not alleged in plaintiff's original petition. As the United States may not be sued without its consent, causes of action not alleged within the period allowed may not be enforced. *Finn* v. *United States,* 123 U.S. 227, 232. The amended petition was not filed within the time allowed; no cause of action was by it brought within the power of the court. *Taylor Co.* v. *Anderson,* 275 U.S. 431, 438–439. *B. & O.S.W. R. Co.* v. *Carroll,* 280 U.S. 491, 495. * * *

United States v. *Seminole Nation,* 299 U.S. 417, 421–422; see, also, *Seminole Nation* v. *United States,* 316 U.S. 286, 288–289.

B. THE CLAIM TO HAVE THE ACCOUNTING BROUGHT UP TO DATE FALLS OUTSIDE THE INDIAN CLAIM COMMISSION'S JURISDICTIONAL AUTHORITY

The statute establishing the Indian Claims Commission expressly provides that "No claim accruing after August 13, 1946, shall be considered by the Commission." 25 U.S.C. 70a. Such claims are not foreclosed, but must be brought under the original jurisdiction of the Court of Claims, which is given jurisdiction "of any [Indian] claim against the United States accruing after August 13, 1946 * * *." 28 U.S.C. 1505. Respondent successfully argued below that it was entitled to have the government produce, and the Indian Claims Commission consider, an accounting for the government's handling of its funds between July 1, 1951, and the present. In holding for respondent, the Commission and the court plainly exceeded the authority conferred by Section 70a.

A claim for an accounting is not the same as a claim for interest on damages for wrongdoing which occurred at a certain time. To the extent the government wronged the Southern Ute Tribe before August 13, 1946, and those injuries have not since been settled, respondent is entitled both to damages for the injury and any increase allowed by law and warranted by the passage of time, up to the very moment of judgment. But an accounting, by reviewing the manner in which the government has handled tribal funds, seeks to expose *new* instances of wrongdoing possibly entitling the claimant to an additional measure of relief. Section 70a flatly denies the Commission authority to consider any such additional causes of action ac-

cruing after August 13, 1946, and places jurisdiction over them in the Court of Claims. Respondent's exception demanding an accounting since 1951 (App. 22) could only involve such matters. The failure of the Tribe to file a claim in the Court of Claims can not justify such an extension of the Commission's limited jurisdiction—again, particularly in view of Congress' repeated insistence upon those limitations.

It is true that, as has been the consistent practice, the accounting in this case was made current until June 30, 1951, rather than August 13, 1946. Many of the judgments entered by the Commission have doubtless involved adjustments for wrongdoings in the 1946–1951 period thus revealed. These adjustments, too, are outside the authority of the Commission to make. *United States* v. *Corrick,* 298 U.S. 435, 440. Perhaps they may be explained as the product of confusion between the statutory limitation on when claims must arise, Section 70a, and the limitation period governing when claims must be filed, Section 70k. It was convenient to select some appropriate closing date, and that wrongful choice having been made and acted upon over the years, the government will continue to honor it even though strictly speaking the resulting judgments are, to a slight extent, without juridical force.

The situation here is dramatically different. What is sought is a new accounting enterprise, covering a period entirely excluded from the Commission's authority and now twenty years long. All but two of the accounting reports prepared for the Commission bear a uniform closing date of June 30, 1951. Yet 44 claims

for a general accounting remain pending before the Commission; others which have already been closed might be reopened. To hold that the period from 1951 to the present must also be accounted for in these cases would expand the Commission's work far beyond Congress' intention.[14]

CONCLUSION

The decision of the Court of Claims should be reversed, and that court should be ordered to direct the dismissal of the complaint as barred by *res judicata*. In the alternative, the court should be instructed to order dismissal of that portion of respondent's exceptions to the government's accounting which presents issues not implicit in the request for an accounting of proceeds from the sale of approximately 81,953.18 acres of land or which requires that the accounting made be brought up to date.

Respectfully submitted.

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JANUARY 1971.

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[14] It has been estimated that 224 man-years of labor would be required to bring the *pending* general accountings claims from their present closing in 1951 to 1969. Hearings on the Status of Indian Claims Litigation, Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess. (April 10, 1970) 54.

APPENDIX

Act of June 15, 1880, 21 Stat. 199, *et seq.*:

CHAP. 223.—An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same.

Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the State of Colorado, their settlement upon lands in severalty, and for other purposes; and

Whereas the President of the United States has submitted said agreement, with his approval of the same, to the Congress of the United States for acceptance and ratification, and for the necessary legislation to carry the same into effect: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed: * * * *And provided also,* That three-fourths of the adult male members of said confederated bands shall agree to and sign said agreement, upon presentation of the same to

them, in open council, in the manner hereinafter provided: * * *

The chiefs and headmen of the confederate [*sic*] bands of the Utes now present in Washington, hereby promise and agree to procure the surrender, to the United States, for trial and punishment, if found guilty, of those members of their nation, not yet in the custody of the United States, who were implicated in the murder of United States Indian Agent N. C. Meeker and the murder of and outrages upon the employees at the White River Agency on the twenty-ninth day of September, eighteen hundred and seventy-nine, and in case they do not themselves succeed in apprehending the said parties, presumably guilty of the above-mentioned crime, that they will not in any manner obstruct, but faithfully aid, any officers of the United States, directed by the proper authorities, to apprehend such presumably guilty parties.

The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

Allotments in severalty of said lands shall be made as follows:

To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and to each other person, under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

* * * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said

Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefor, so soon as the necessary laws are passed by Congress. * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, * * * a commission shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support * * *.

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

* * * * *

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said

Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion here-

inbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act * * *.

SEC. 10. If the agreement as amended in this act is not ratified by three-fourths of the adult male Indians of the Ute tribe within four months from the approval of this act the same shall cease to be of effect after that day.

Approved June 15, 1880.

Act of February 20, 1895, 28 Stat. 677 *et seq.*:

CHAP. 113.—An Act To disapprove the treaty heretofore made with the Southern Ute Indians to be removed to the Territory of Utah, and providing for settling them down in severalty where they may so elect and are qualified, and to settle all those not electing to take lands in severalty on the west forty miles of present reservation and in portions of New Mexico, and for other purposes, and to carry out the provisions of the treaty with said Indians June fifteenth, eighteen hundred and eighty

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.

SEC. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of lands, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen hundred and eighty, entitled "An Act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same," and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.

SEC. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant

rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved.

SEC. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *.

* * * * *

SEC. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe.

Approved, February 20, 1895.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,
Petitioner,

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA,
Petitioner,

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. May the United States avoid an obligation to pay the Southern Ute Tribe for approximately 230,000 acres of land within the Southern Ute Reservation taken in violation of the Act of 1895 on the basis of the government's assertion that the Southern Ute Reservation was among land unqualifiedly ceded to the United States by the Confederated Bands of Ute Indians by the Act of 1880, and allegedly included in a stipulation in 1950 settling other litigation between the Confederated Bands of Ute Indians and the United States?

2. When the United States admits responsibility to account for the trust proceeds from the disposal of approximately 82,000 acres of Southern Ute lands, is it not also responsible to account properly and completely for the management of the proceeds, particularly where the Southern Ute Tribe, as beneficiary, has not had such an accounting until this suit was filed?

3. When the United States admits it is responsible for an accounting of the trust funds of the Southern Utes, is it not obliged to account for its handling of any such proceeds from receipt until the date of judgment in the instant proceeding, particularly where the accounting and provable wrongdoings involve activities which began and accrued prior to 1946 and continue down to date?

STATEMENT OF THE CASE

I. Agreements and Acts Affecting the Southern Utes

For a long time prior to 1868, the Confederated Bands of Ute Indians, a confederation of the Uncompahgre (formerly Tabequache), White River (formerly Yampa and Grand River), and Southern and Ute Mountain Ute (collectively referred to as Southern Utes and sometimes designated as Capote, Muache and Weeminuche),[1] occupied an extensive region which spanned western Colorado, northern New Mexico and parts of Utah. A.69-70. By the Treaty of March 2, 1868 (15 Stat. 619), the Confederated Utes agreed to cede to the United States a portion of their aboriginal lands, reserving for themselves a reservation in western Colorado approximating 15,700,000 acres.[2]

---

[1] *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 413, 415.

[2] This reservation consisted of the areas indicated by Charles C. Royce, *Indian Land Cessions in the United States*, Colorado 1 (18th Ann. Rep., B.A.E. 1896-1897, Part II), as Areas 616, 566 and 617. Area 566 was the Brunot Cession, 616 the area ceded by

Subsequent discovery of large and valuable mineral deposits on the Confederated Ute Reservation prompted the United States to persuade the Confederated Bands to cede approximately 3.7 million acres of the east-central portion of their reservation. This became known as the Brunot Cession of 1873.[3]

Except for the Brunot Cession, which virtually severed the original 1868 reservation into two disproportionate parts, the Confederated Bands of Utes continued to occupy their reservation in western Colorado, the White Rivers occupying generally the northern sector of the reservation, the Uncompahgres the central portion, and the Southern Utes the southern portion.[4] The so-called "Meeker massacre," in which Indian Agent Meeker and others were killed by White River Utes in 1879, led the United States to negotiate with the Confederated Bands

---

the Act of 1880, and 617 was the Southern Ute Reservation in suit. See Appendix A to respondent's opposition to the petition for a writ of certiorari.

[3] A. 70. The Southern Utes, when approached by a Commission appointed pursuant to the Act of May 3, 1878 (ch. 87, 20 Stat. 48), the purpose of which was to consolidate all Ute agencies on the White River, claimed they had been overreached in such negotiations and refused to move to White River. Annual Report, Commissioner of Indian Affairs, 1879, p. 171 (hereafter cited "CIA 18—").

[4] Article IV, Section 1, of the 1874 Act obligated the United States to "establish an agency" for the Southern Utes "on the southern part of the Ute reservation." 18 Stat. 36, 37. The United States complied and kept the agency staffed. The report of the Agent for the Southern Utes dated August 28, 1879, for instance, includes this:

> "That portion of the Ute tribe known as *Southern Utes*, . . . are located on the Southern Ute Reservation, in the south western part of Colorado, bordering on New Mexico." CIA 1879, p. 16. (Emphasis in original).

The Agent went on to explain that the agency buildings were located on the Rio Los Pinos, east of the La Plata River. *Id.*, at 17. Except for a 20-mile strip between the Utah border and the Brunot Cession, the Southern Utes were cut off from the White Rivers and Uncompahgres to the north. A. 70.

of Utes for a cession of their diminished 1868 reservation and removal to other areas.[5] An agreement was reached and ratified by the Act of Congress of June 15, 1880, 21 Stat. 199. The record of the ratification by the Indians explains that the Act ceded "all right, title, interest, and claim . . . *excepting and reserving such lands* on the La Plata River" and near the mouth of the Gunnison as required for the Southern and Uncompahgre Utes.[6]

Under that Agreement, A. 70-71, which was later accepted by the required vote of three-quarters of the adult male Utes:

(1) The Confederated Bands "ceded" to the United States "all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement."

> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.
>
> "The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.
>
> "The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah." (21 Stat. 199, 200).

---

[5] The negotiations were with a delegation of Utes brought to Washington for that purpose.

[6] CIA 1881, p. 208. Emphasis is supplied throughout this brief unless otherwise indicated.

(2) A Commission to be appointed was to take a careful census of the Indians, separating them as to Southern Utes, Uncompahgre Utes and White River Utes.

(3) Allotments in severalty to individual Utes were to be made after preparation of the census and completion of the surveys in the vicinities named in the agreement.

(4) The remainder of the ceded lands were to be subject to cash entry only in accordance with then existing law.

Shortly after the Act of 1880 was accepted by the required number of Utes, the Ute Commission under the Chairmanship of George W. Manypenny was formed. The census was completed and the Confederated Bands were officially separated into three divisions:[7]

a. Those known as "Southern Utes," comprising the Capote, Muache and Weeminuche Bands, living in the southern part of the diminished 1868 Treaty reservation;

b. The "Uncompahgre Utes," composed of the Tabequache Band, residing in the central portion of the reservation; and

c. The "White River Utes," made up of the Yampa and Grand River Bands, from the northern section of the reservation.

After some difficulty, the Commission settled the Uncompahgre and White River Utes in Utah Territory. As to the Southern Utes, Manypenny recommended, after an inspection in the area, that the strip of land 100 miles long and 15 miles wide (Royce Area 617) be preserved for an indefinite period as an Indian reservation for the Southern Utes.[8] The Ute Commission report, as the Court of

[7] *Ute Indians* v. *United States*, 45 C.Cls. 440, 448; A. 24-25.

[8] That area was already recognized as the Southern Ute Reservation. CIA 1880, p. 17; CIA 1879, p. 16. In September, 1881, the

Claims noted, indicated that "both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures." A. 76.

There was some uncertainty respecting the status of the lands ceded by the Act of 1880 following the removal of the White River and Uncompahgre Utes to Utah.[9] Apparently acting on advice from Attorney General Brewster to the effect that additional legislation was required to declare the portion of the Ute reservation "lately occupied by the Uncompahgre and White River Utes . . . to be public land of the United States, and subject to disposal" as such, Congress passed the Act of July 28, 1882, 22 Stat. 178.[10] It declared all of the land "lately occupied by the Uncompahgre and White River Utes" to be public land and subject to disposal in accordance with Section 3 of the Act of 1880; and in Section 2, provided that the Secretary of the Interior, at the earliest practicable day, ascertain and establish the line between the Southern Utes and the areas to the north. Instructions by the Secretary of the Interior for the survey provided that the survey was to commence at a point north of Royce Area 617. A. 77.

After the line was surveyed, the Southern Utes continued to live in the 15-mile strip recognized as their reservation.[11] This left the Southern Utes living between two white communities—one to the north in Colorado and one to the south in New Mexico. A. 79. The Secretary

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agent at the Southern Ute Agency reported the "Southern Ute Indians are located on *their old reservation* in Southwestern Colorado . . . 15 miles in width and 100 miles in length." CIA 1881, p. 23.

[9] *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 417.

[10] S.Doc. No. 108, 47th Cong., 1st Sess., pp. 1, 3-4. The Attorney General had advised the Secretary of the Interior on February 14, 1882, that additional legislation would be necessary to authorize dispositions under the public land laws. *Id.*, at 3-4.

[11] See, *e.g.*, CIA 1882, pp. 17-18; CIA 1891, p. 227.

of the Interior, on April 5, 1888, considering this problem, acknowledged the difficulty of protecting them from invasion by the whites, and recognized that "we are bound by solemn treaty stipulations . . . to prevent white people from entering upon or crossing said reservation." A. 79. This led to enactment of the Act of May 1, 1888, 25 Stat. 133. It provided for appointment of a Commission to negotiate with the Southern Utes for modification "of their treaty and other rights," possible "exchange of *their reservation*," and negotiation with other Indians if the Southern Ute Indians should determine "to remove from their present location."

An agreement was reached with the Southern Utes under which they would give up their reservation in Colorado and settle upon a reservation in southern Utah. This agreement was never ratified by Congress; in fact, it was "annulled" when Congress passed the Act of February 20, 1895, 28 Stat. 677.[12] That Act provided that the "treaty made with said Indians," ratified by the Act of 1880, "be carried out as *herein* provided, and as further provided by general law for settling Indians in severalty." It directed the Secretary of the Interior to provide for allotment in severalty "in their present reservation in Colorado" of such Southern Ute Indians as may elect and be considered by him to be qualified to take allotments.[13] It also provided that the western end of the 15-mile strip be reserved and set aside for those Southern Utes who did not elect or were not qualified for allotments. The lands *not allotted*[14] were to be subject to

[12] CIA 1890, p. XLIII; CIA 1891, p. 228; see S.Rept. 279, 53d Cong., 2d Sess., on S. 1532, a bill to ratify the 1888 Agreement.

[13] The allotments were to come from the lands "embraced in their present [Southern Ute] reservation in Colorado." (Sec. 2, 28 Stat. 677).

[14] Section 5 of the 1895 Act provided that the money realized from the sale of lands not allotted was to be held in the Treasury of the United States *in trust* for the Southern Ute Indians. 28 Stat. 678.

entry under public land laws at not less than $1.25 per acre. The 1895 Act also required that a majority of the male adult members of the Southern Ute Tribe living on the Southern Ute Reservation agree to its implementation (Sec. 6).

Most of the Capote and Muache Utes received allotments. A. 29. They continued to live in the eastern part of the reservation and became known and recognized as the Southern Ute Tribe.[15] Most of the Weeminuche Utes elected not to take allotments and continued to live in the area set aside as their reservation by Section 3 of the 1895 Act. This became known as the Ute Mountain Reservation and was administered by a separate agency, and the Weeminuche became known and recognized as the Ute Mountain Ute Tribe. The Ute Mountain lands are not involved in this case.[16]

Soon after the unallotted lands of the Southern Ute Reservation were opened to entry in 1889, Congress passed the Free Homestead Act of May 17, 1900, 31 Stat. 179. It provided that homesteaders fulfilling residence requirements on ceded Indian lands would be relieved of any "other or further charge of any kind whatsoever." 43 U.S.C. 179.[17] Over 35 years passed during which the Southern Ute lands remained available for free homesteads. It was not until 1938, after the Congressional

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[15] The Southern Ute Tribe is organized under the Indian Reorganization Act. 48 Stat. 984. A. 24.

[16] A. 29. The Ute Mountain Tribe is also organized under the Indian Reorganization Act.

[17] Because of some doubts as to whether that portion of the diminished 1868 Treaty reservation opened by the Acts of 1880 and 1882 was covered by the 1900 Free Homestead Act, Congress passed the Ute Free Homestead Act of June 13, 1902, 32 Stat. 384, 43 U.S.C. 203. The effect of the two Free Homestead Acts was the same, namely, no cash payment was required from the homesteader. See S.Rept. 1744, 57th Cong., 1st Sess.; and the debate in the House of Representatives, 35 Cong. Rec. 5493-5.

policy of giving away the Indians' unallotted lands had changed, that beneficial title to the undisposed of lands on the Southern Ute Reservation, relinquished under the 1895 Act, was restored to the Tribe, as provided by law. A. 29.[18]

Between the 1899 opening and the 1938 restoration, about 230,000 acres of land belonging to the Southern Ute Tribe were disposed of as free homesteads, for which "No payment has been made." A. 30-1. This is the land for which the Indian Claims Commission held the Southern Utes were entitled to just compensation and the court below affirmed except for the acreage which the court said was still open to proof. A. 97.

From July 26, 1899, to June 30, 1928, the government received $215,977.58 from the sale of some unidentified lands of the Southern Ute Tribe and this money was deposited in a Treasury account styled "Proceeds of Southern Ute Reservation," made up of "moneys available pursuant to the" 1895 Act. A. 31, 138.

In addition to the money received from the land sales, during the period May 13, 1892, to June 29, 1940, the government took in $19,124.22 and deposited it in a Treasury account entitled "Indian Moneys, Proceeds of Labor, Southern Ute Indians" (IMPL). A. 33-4. These proceeds represented in the main income from tribal trust lands, in the form of mineral royalties, timber sales, grazing and lease rentals, and damages for railroad rights-of-way. A. 33-4.

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[18] Order of Restoration, September 14, 1938, 5 Kappler 659; compare *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands*, 56 I.D. 330, 331 (1938). The first paragraph of the 1938 Restoration Order reads as follows:

> ". . . [P]ursuant to the provisions of the Act of February 20, 1895 . . . the Southern Ute Band of Indians in Colorado ceded to the United States a large area of *their reservation* in the State of Colorado *established expressly for their benefit* under the treaty of June 15, 1880 . . . ."

II. Prior Litigation by the Confederated Bands of Ute Indians Enforcing Rights Under the 1880 Act

Through the years, the Confederated Bands of Ute Indians have sued in the Court of Claims, and later the Indian Claims Commission, enforcing their rights under various treaties and agreements. Important to this case is the prior litigation surrounding the Act of 1880. For clarity, called for by the government's treatment in its brief, we review the main cases of the Confederated Bands which the government has contended, at one time or another, are *res judicata* to this sole claim of the Southern Ute Tribe.

1. *The 1910 accounting (No. 30360).* The Confederated Bands of Ute Indians sued under a 1909 jurisdictional act, 35 Stat. 788, for (a) an accounting of funds received by the United States from lands disposed of pursuant to the Act of 1880, and (b) payment for lands set aside as national forest reserves within the area ceded by the Act of 1880. *The Ute Indians* v. *United States*, 45 C.Cls. 440. In response to a call by the Court of Claims, the Secretary of the Interior reported on April 21, 1909, that between June 15, 1880, and June 30, 1908, the sum of $2,204,694.71 had been collected by the United States from disposals of lands "within the Ute Reservation"; but the Secretary's response did not distinguish between the kinds or locations of disposals and gave total quarterly receipts only.[19] However, in a response dated August 2, 1904, pursuant to an earlier call of the court in basically the same proceedings and made a part of the record, the Secretary supplied a statement up to June 30, 1903 "of the land sold by the United States under the acts of June 15, 1880, and February 25, 1895, lying within the Ute Indian Reservation in Colorado," but again without distinguishing between the amounts accruing un-

[19] Vol. 239, Printed Records, Court of Claims, December Term, 1909-1910, pp. 341-45.

der either Act.[20] The collections reported in the two secretarial responses are the same up to 1908. Thus, in an unidentified amount, the reported receipts between 1899 and June 30, 1908, included some proceeds of some lands disposed of under the Act of 1880, as well as the 1895 Act, and to the extent so included, those funds were in the gross $2,204,694.71 credited to the Confederated Bands. 45 C.Cls. 453, 461. The judgment was brought up to date, June 30, 1910. 46 C.Cls. 225.

As to the forest lands, the court found, based on the Secretary's response, that a total of 3,199,258 acres inside the diminished 1868 Treaty reservation (*supra*, pp. 2-3) had been set aside as national forest reserves. Of that amount, some 49,594 acres of the San Juan National Forest, set aside in 1907, 34 Stat. 3308, were within the Southern Ute Reservation; however, the proclamation did not show that any of the lands were within the reservation. Under the direction of the 1909 jurisdictional act, the court treated all forest reserves as if the land had been disposed of under the public land laws and fixed a value of $1.25 per acre, resulting in a total credit of $3,999,072.50 to the Confederated Bands. 45 C.Cls. 452-3. Thus, to the extent that the 49,594 acres were inside the Southern Ute Reservation, the sum of $61,993 ($1.25 per acre) out of the total credit of $3,999,072.50 was attributable to lands within the Southern Ute Reservation.

2. *The forest reserves claim (No. 47566).* In 1946, the Confederated Bands brought suit under the Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209, for just compensation for the taking by the United States of the same 3,199,258 acres of land set aside as national forest reserves and for which the Confederated Bands were credited with $3,999,072.50 in the 1910 accounting case. A stipulation for the entry of final judgment in the

[20] Vol. 217, Printed Records, Court of Claims, December Term, 1904-1905, pp. 70-74.

1946 case was approved and entered by the Court of Claims on July 13, 1950. *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 440. The settlement was based on a taking under the Fifth Amendment for which the United States was obligated to pay just compensation for the lands ceded by the Confederated Bands under the Act of 1880 and set apart by the United States for national forest purposes. The agreed value in No. 47566 for the 3,199,258 acres was $1.00 per acre, plus interest from the date of the Court of Claims judgment in 1910, less a deduction for the United States of $1.25 per acre ($3,999,072.50), as credited to the Confederated Bands in the 1910 judgment. 117 C.Cls. 440; see 120 ClCls. 641-2.[21]

3. *The undisposed of ceded lands claim (No. 45585).* A petition was filed November 22, 1941, by the Confederated Bands of Ute Indians pursuant to Section 6 of the 1938 jurisdictional act, 52 Stat. 1209, for the taking by the United States of the undisposed of land "north of and including township 35 north" ceded by the Act of 1880 (all outside the Southern Ute Reservation). In an opinion and interlocutory judgment dated October 4, 1943, the Court of Claims held that Section 6 constituted a taking of all the undisposed of lands "north of and including township 35 north," ceded in trust to the United States by the Confederated Bands in the Act of 1880. *Confederated Bands of Ute Indians* v. *United States*, 100 C.Cls. 413. The government's subsequent motion for instructions—in reality a new attack on the ground for liability in the 1943 decision—was denied on November 3, 1948. 112 C.Cls. 123, 137.

A stipulation for the entry of final judgment was approved and entered by the Court of Claims on July 13,

[21] Following the settlement in 1950 of this and other cases, the Court of Claims entered detailed findings on the bases for the settlements in connection with the award of attorneys fees. *Confederated Bands of Ute Indians* v. *United States*, 120 C.Cls. 609. Those findings are referred to here when they are explanatory.

1950, providing for payment of $24,296,127.24, plus 4% interest on $16,822,112.69 thereof, from July 10, 1950, to the date of payment of the $24,296,127.24. 117 C.Cls 434. The stipulation provided that the judgment so entered "shall be in full settlement and payment for the complete extinguishment" of the Confederated Bands' "right, title, interest, estate, claims, and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 . . . ."

As explained in the order for final judgment, the court's 1943 interlocutory judgment of liability (100 C. Cls. 413) was a "holding that plaintiffs were entitled to recover just compensation for all lands in Colorado north of and including township 35, north, held by the United States for disposal under Section 3 of the Act of June 15, 1880, at the time of approval of the Act of June 28, 1938," subject to the deduction of offsets. 117 C.Cls. 434.[22] None of that land was within the Southern Ute Reservation, as the government advises this Court. Br. 11.

4. *The free homestead lands claim (No. 46640).* This was the Confederated Bands' suit under the 1938 jurisdictional act, 52 Stat. 1209, for (a) an accounting for the proceeds received by the United States from all land sales between June 30, 1910, and June 28, 1938, of the lands ceded under the Act of 1880, and (b) the value of any such lands disposed of as free homesteads or taken by the United States for its own purposes.

A stipulation for the entry of final judgment was approved and entered by the Court of Claims in the amount

[22] Two schedules of land descriptions were annexed to the stipulation containing the individual tract descriptions of 4,403,935.87 acres of "surface and subsurface rights" and 787,056.86 acres of "subsurface rights only." Both schedules were prepared with such accuracy as "the parties with diligence have been able to determine." 117 C.Cls. 435.

of $6,037,567.72, plus 4% interest on $2,939,847.31 from July 10, 1950, to date of payment. *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 436. The stipulated judgment was in

> "full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado ceded by plaintiffs to defendant by the Act of June 15, 1880 (21 Stat. 199), which (a) the United States sold for cash between July 1, 1910, and June 28, 1938, (b) disposed of as free homesteads from December 19, 1885, to June 28, 1938, and (c) set aside for public purposes during the period from June 30, 1910, to June 27, 1938." 117 C.Cls. 436-437.

Annexed to and part of the stipulation and judgment was Schedule 1 containing the individual tract descriptions of 1,523,236.95 acres of land which the government had disposed of—1,361,993.22 acres as free homesteads and 161,243.73 acres set aside for public purposes.[23] These acreages are recited in the stipulation. The land descriptions in Schedule 1 represent "*all* the land so disposed of and set aside" so far as "the parties with *diligence*" could determine, but to assure that the settlement was complete, the following catch-all sentence was included in the stipulation (117 C.Cls. 437):

> ". . . However, the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes."

[23] This document was also introduced in the present case as Southern Ute Exhibit 22. (Tr. 86, October 8, 1963).

Upon extensive examination, confirmed by the government's representatives,[24] it was agreed by the parties that 1,361,993.22 acres had been disposed of by the United States as free homesteads and an additional 161,243.73 acres were taken by the government for its own use, making a total of 1,523,236.95 acres, and Schedule 1 contains the tract-by-tract descriptions of those lands. 117 C.Cls. 437; 120 C.Cls. 638. The United States agreed with the Confederated Bands that $1.93 per acre was the "reasonable market value" of the lands. 120 C.Cls. 639.

Simple multiplication shows that $1.93 per acre for the total 1,523,236.95 acres results in the principal amount of $2,939,847.31 as set out specifically in the final judgment, and that the remainder of the total judgment of $6,037,567.72, or $3,097,720.41, represents interest, as the increment of just compensation. 117 C.Cls. 436-7; 120 C.Cls. 639. It is a mathematical certainty that no Southern Ute Reservation land here claimed was paid for in No. 46640. There was *not one single acre* of the approximately 230,000 acres claimed in this suit identified or paid for in No. 46640.[25]

As filed, No. 46640 also included an accounting claim to cover the period from June 30, 1910 (final judgment date in No. 30360, 46 C.Cls. 225; 45 C.Cls. 440), to June 28, 1938. Upon exhaustive examination, the Confederated Bands became satisfied that the $1,143,723.89 collected from the disposal of about 605,190.54 acres had been paid over to the Confederated Bands and no fur-

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[24] These acreages were "accepted by counsel for both sides as the basis for the stipulated judgment" in the case. 120 C.Cls. 638. The diligence with which the descriptions were prepared is related in 120 C.Cls. 637-8 and in the supplemental findings of the Indian Claims Commission. A. 62-5.

[25] The government has agreed on more than one occasion that none of the approximately 230,000 acres here claimed is identified in Schedule 1. See, *e.g.*, Tr. 11, April 17, 1968, Indian Claims Commission.

ther relief as to that matter was sought. 120 C.Cls. 637-9. Additionally, the Confederated Bands had pending a general accounting claim in which the disposition and other transactions, other than collection of proceeds, were covered. No. 47567, *infra*, this page.

5. *The Executive Order lands claim (No. 45783).* By an Executive Order dated November 22, 1875, the President withdrew and set apart for the Ute Indians about 625,000 acres of land as an addition to "their present reservation" along the north boundary of the diminished 1868 Treaty reservation. About seven years later, in an Executive Order dated August 4, 1882, the lands covered by the 1875 withdrawal were restored to the public domain. The Confederated Bands of Ute Indians brought suit under the 1938 jurisdictional act for the loss of the 625,000 acres of Executive Order land. The case was dismissed by the Court of Claims and this Court affirmed that judgment on the ground that the Confederated Bands had no compensable ownership interest in the 1875 Executive Order lands. *Confederated Bands of Ute Indians* v. *United States*, 106 C.Cls. 33, 51, 64 F.Supp. 569; affirmed, 330 U.S. 169 (three Justices dissenting).

The government tells the Court that counsel, in their briefing in 1947, told this Court that the Ute Indians ceded *all* Colorado lands in 1880. Br. 11. We will have more to say about this a little later, but suffice it to say for now that the government exaggerates (see discussion, *infra*, pp. 43-6). This Court's opinion on the Executive Order lands claim and counsel's statements fall far short of the government's interpretation of the holding (Br. 12), let alone what counsel briefed (*infra*, p. 44).

6. *The general accounting claim (No. 47567).* On December 30, 1946, a general accounting claim was filed by the Confederated Bands of Ute Indians for all jointly shared funds from March 2, 1868, the ratification date of the treaty which recognized their reservation in western Colorado (15 Stat. 619), to December 31, 1946, the

cutoff date under the 1938 jurisdictional Act (52 Stat. 1209). *Confederated Bands of Ute Indians* v. *United States*, 174 C.Cls. 1279. By stipulation, entered as part of the judgment on February 8, 1966, by the Court of Claims, "all rights, claims, and demands" which the Confederated Bands have or could have had were concluded as of December 30, 1946, with offsets down to June 30, 1964. 174 C.Cls. 1279. The settlement was subject to the following exclusions, *Id.*, at 1281:

> "4. This settlement does not involve the four funds: (1) Proceeds of Southern Ute Reservation; (2) Interest in Proceeds of Southern Ute Reservation; (3) Indian Moneys, Proceeds of Labor, Southern Ute Indians; and (4) Interest on Proceeds of Labor, Southern Ute Indians.
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> "5. Neither the claims nor defenses asserted in Indian Claims Commission Docket No. 328 are affected by the disposition of this case. Counsel for plaintiffs in No. 47567, who are also counsel for petitioner in No. 328, will make no claim in No. 328 for funds involved in No. 47567."

SUMMARY OF ARGUMENT

I

The claims in suit are not barred by res judicata

The Confederated Bands of Ute Indians ceded to the United States through the Act of 1880 all of their diminished 1868 Treaty reservation, excepting and reserving to the Southern Utes such lands in the vicinity of the La Plata River in southern Colorado as were necessary for their occupancy pursuant to that Act. As to the lands actually ceded in trust by the Act of 1880, in which the Confederated Bands shared jointly, the United States opened them to entry under the public land laws by a supplementary 1882 Act, which also required the survey of a line dividing the lands reserved to the Southern Utes from those ceded and opened.

These actions in 1880 and 1882 confirmed the ownership of the Southern Ute lands in southern Colorado. A few years later, pursuant to Congressional authorization, Commissioners for the United States entered into an agreement with the Southern Utes alone for an absolute cession of the area reserved for them under the Act of 1880. This action in 1888 again confirmed the complete ownership of the Southern Utes of their reserve as opposed to the lands ceded and opened by the Acts of 1880 and 1882.

Congress failed to ratify the Agreement of 1888 with the Southern Utes and, in fact, specifically "annulled" it and substituted the Act of February 20, 1895, 28 Stat. 677, under which the Act of 1880 was to be carried out as "provided" in the 1895 Act. The 1895 Act provisions were substantially different from those of the Act of 1880; some Southern Utes were to be allotted and some were not. For those not allotted, a separately described reservation from within their reserved lands was delineated for their sole and absolute ownership. Those Southern Utes to be allotted were to receive their individual allotments and the proceeds from the disposal of the lands surplus to allotment within the area reserved for them and separated from the lands opened by the Act of 1882.

The Southern Utes were recognized as a separate landowning entity distinct from the Confederated Bands of Ute Indians with whom they shared jointly and ceded the diminished 1868 Treaty reservation by the Act of 1880, except for the Southern Ute lands. The entire history of legislative and administrative events from a time before the Act of 1880 until after the 1895 Act points to the inescapable conclusion that there was both Congressional and administrative recognition of complete ownership by the Southern Utes of the lands reserved for them under the Act of 1880.

The Southern Ute Tribe sued under Section 2 of the Indian Claims Commission Act for just compensation for about 230,000 acres of land disposed of by the United States in violation of the 1895 Act and also for an accounting for the proceeds received by the United States from other lands (about 82,000 acres) disposed of in accordance with the 1895 Act. The government defended on the ground that the claims were *res judicata* because of a prior judgment pursuant to a settlement stipulation in 1950 in a case in the Court of Claims brought by the Confederated Bands of Ute Indians for their joint losses under the Act of 1880. The Indian Claims Commission held that the Southern Utes were entitled to just compensation for the taking of the 230,000 acres, that the claims were not *res judicata* because the parties and issues were different, and that the lands in this suit were not ceded by the Act of 1880, but by the 1895 Act. The Court of Claims, on appeal by the government, affirmed except for the acreage taken.

II

The respondent is entitled to a true and proper accounting

The government apparently admits that the Southern Ute Tribe has not had an accounting of the proceeds from the 82,000 acres but asserts that, if not *res judicata*, on the same basis as the claim for just compensation, the accounting pleaded is being turned into a general accounting and the statutory time bar in the Indian Claims Commission Act prohibits such a general accounting. Additionally, the government objects to the order of the Indian Claims Commission, affirmed by the court below, that the government furnish the accounting down to the date of judgment.

The government's attack is on the jurisdiction of the Indian Claims Commission, affirmed by the court below, conduct after August 13, 1946, and it goes so far as to suggest that prior adjudications of the Indian Claims

Commission in which it was a party are without force. The details of the accounting in this case clearly show that there is nothing general and that each item is directly related to the specific accounting claim pleaded. As for the up-to-date accounting, the Indian Claims Commission and the Court of Claims relied on the elementary principle that once jurisdiction attaches the tribunal is entitled to determine all matters related thereto down to the date of judgment. Both the Commission and the Court of Claims have held this position in reliance on their established precedents since at least 1956, without deviation (and without appeal to this Court by the government).

ARGUMENT

I. These Claims are Not Precluded by the Defense of Res Judicata

This is a case where the United States, as trustee and guardian of the Southern Ute Tribe of Indians, has taken tribal land by giving it away and has failed to account to the Tribe for the proceeds from other lands. It seeks to escape liability to pay for the lands and to render a proper and complete accounting by erroneous interpretations of the Act of 1880 and a stipulation of settlement in prior litigation involving another entity and different property.[26] If upheld, the United States would be allowed to avoid any payment whatsoever for over 230,000 acres of Southern Ute lands taken in violation of the Act of February 20, 1895, 28 Stat. 677, and an accounting for proceeds received by the United States under that Act.

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[26] *Confederated Bands of Ute Indians* v. *United States*, 117 C. Cls. 433.

A. *The Southern Utes Reserved Their Lands Under the Act of 1880, which Ceded the Lands of the Confederated Bands of Ute Indians*

The Confederated Bands of Ute Indians, of which the Southern Utes were a constituent part, owned and occupied all of their diminished 1868 Treaty reservation, when in 1879, following the so-called "Meeker massacre," the United States decided on its own that the Utes must be removed from the scene of that tragedy, and possibly from Colorado entirely.[27] To accomplish this purpose, a delegation of the Confederated Bands was brought to Washington and was induced to propose a cession of their diminished 1868 Treaty reservation.[28] The "agreement" was not signed by any government officer, but was ratified by Congress as amended by the Act of June 15, 1880, 21 Stat. 199.

The Act of 1880 provided for ratification by three-fourths of the adult male members of the Confederated Bands,[29] none of whom other than the nine negotiators had seen the cession documents up to that point. The Act provided for a cession of the diminished 1868 Treaty reservation "*except*" that the Uncompahgre Utes were to be allowed to settle upon agricultural lands on the Grand River near the mouth of the Gunnison River, in Colorado, if sufficient land could be found there, otherwise, in the Territory of Utah;[30] the White River Utes were to remove to and settle upon agricultural lands on the

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[27] S.Rept. 279, 53d Cong., 2d Sess., pp. 1-2, to accompany S.1582.

[28] A delegation of Utes was brought to Washington in the winter of 1880 and remained during negotiations which spanned a period of eight weeks for this purpose. CIA 1880, pp. XXIV, 18.

[29] This was required by Article XVI of the 1868 Treaty. 15 Stat. 622.

[30] Br. 45. Sufficient land was not found in that vicinity; the Uncompahgre Utes were thereafter settled in Utah. A claim based on the failure of the government to locate sufficient land in Colorado for the Uncompahgre Band as provided in the Act of 1880 was settled. 14 Ind.Cl.Com. 707.

Uintah Indian Reservation in Utah; and the Southern Utes were [31]

> "... to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico."

The ratification agreement was signed by the Southern Utes in August and September of 1880. It was the only document ever signed by the Indians to ratify the cession under the Act of 1880. The ratification document provided that the Southern Utes did "cede, sell and convey" to the United States the diminished 1868 Treaty reservation "excepting and reserving such lands on the La Plata River and in its vicinity . . . selected and set apart for the whole or a part of the Southern" Utes in pursuance of the Act of 1880.[32]

The government argues that the United States proposed "an agreement to eliminate, completely, the existing reservation," and that it was "central to the new scheme," *i.e.*, the Congressional plan, that none of the land reserved by the Southern Utes was to be held tribally. Br. 6. The clairvoyance of the government in 1971 seems particularly questionable in view of the fact that Congress, which ratified the Agreement of 1880, never was so certain about what it had effected by the

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[31] Br. 44. The La Plata River runs southwestward through about the middle of Royce Area 617.

[32] CIA 1881, p. 208, Ratification of Agreement with Utes. As to the mechanics of the Agreement and Act of 1880, Assistant Attorney General Willis Van Devanter stated: "This agreement was originally submitted at Washington by 'certain of the chiefs and headmen' of the Indians and had not been acted upon by the Indians themselves in council or otherwise." *Opinion*, 25 L.D. 97, 99, approved August 5, 1897, by the Acting Secretary of the Interior.

Act of 1880. And the administrator of the matter, the Secretary of the Interior, the cabinet officer responsible for supervision of the affairs of the Indians at the time, reached the entirely opposite conclusion as to the Act of 1880.

That the government's present interpretation is not supportable is demonstrated by a review of the legislative and administrative events which followed ratification of the Act of 1880. The parties to that Act intended, as is clear from the agreement, that *some* of the Utes would always remain on the diminished 1868 Treaty reservation. The Uncompahgres were to be settled on agricultural lands at the mouth of the Gunnison River and the Southern Utes upon agricultural lands in the area of the La Plata River in southern Colorado. Br. 44-5. Congress fully realized a clear identification of the Confederated Bands was necessary when it provided for a commission to take a careful census and identify the members of the separate bands comprising the Confederated Bands. 21 Stat. 202.

After its appointment, the Ute Commission completed the census and separated the Confederated Bands. It recommended that the United States modify the Act of 1880 as to the Southern Utes and "preserve" the 15-mile strip along the southern Colorado border "for an indefinite period *as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein.*" [23] This was the administrative conclusion

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[23] Quoted at length by the court below. A. 75-6. Following selection of lands for allotment, and upon investigation of the Southern Utes, Commissioner Manypenny recommended as follows (A. 76):

"I can see no other way than to so modify the [1880] agreement, so far as these [Southern Ute] Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and *preserve all the land within these lines for an indefinite period as an Indian reser-*

reached immediately following the Act of 1880. The Secretary of the Interior then advised Congress late in 1881 that the Southern Utes "still occupy their old reservation" and that there was insufficient agricultural land for their allotment in the vicinity of the La Plata River.[34]

B. *The 1882 Act Was Necessary to Authorize Disposition of the Ceded Lands*

As noted by the Court of Claims, the November 21, 1881 report of the Ute Commission demonstrated "that both sides regarded the 1880 agreement as not in effect as to the Southern Utes, pending further measures." A. 76. They were living on their 15-mile strip, but the other bands of Confederated Utes had been moved to Utah.[35] Since the Act of 1880 did not actually allow settlement by non-Indians on any of the ceded lands, Congress passed the Act of July 28, 1882, 22 Stat. 178, which declared all of the area theretofore occupied by the Uncompahgre and White River Utes to be public land and subject to disposal in accordance with the Act of 1880. At the same time, the Act of 1882 segregated the Southern Ute 15-mile strip from the opened area.[36] The 1882 Act required that the Secretary of the Interior "ascertain and establish the line" between the Uncompahgre and White River areas on the north and the Southern Ute area on the south, *i.e.*, Royce Areas 616

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vation, and let the United States laws in relation to Indian reservations have full force therein."

The Ute Commission adopted this recommendation and so reported to the Secretary of the Interior. CIA 1881, p. 325.

[34] CIA 1881, pp. XLVI, 333. Appropriate measures were also taken by the Ute Commission for the settlement of the other bands of Confederated Utes. CIA 1881, pp. 326-332; see *Uintah and White River Bands of Ute Indians* v. *United States*, 139 C. Cls. 1, 5-6.

[35] See documents cited in fn. 34, *supra*.

[36] See fn. 10, *supra*.

and 617, respectively. As indicated by the Court of Claims, A. 77-78, the instructions of the Secretary of the Interior to the district land offices to implement the Act of 1882 indicated a clear understanding that Royce Area 617 was to be continued as a reservation for the Southern Utes, with the land held in tribal ownership.

The events surrounding the 1880 and 1882 Acts establish that the United States formally separated the Confederated Bands of Utes, recognized the Southern Utes as a separate entity and identified and acknowledged their ownership of the area reserved for them by the Act of 1880. When the United States ordered and took the census to identify and separate the Southern Utes, consisting of the Capote, Muache and Weeminuche Bands, all in accordance with the 1880 Act, it recognized a new land-owning entity different from the Confederated Bands of Utes.[37] The Ute Commission, when it recommended continuation of the 15-mile strip as an Indian reservation, identified and recognized the Southern Utes as the sole owners. Even if this was regarded as less than recognized title at that time, the events most certainly constitute Congressional knowledge of the *de facto* situation of administrative recognition of the tribal rights of the Southern Utes in the 15-mile strip.

This action by the United States and its administrators shows conclusively that the rights of the Confederated Bands as an entity in the 15-mile strip were terminated upon establishment of the lands as a reservation for the Southern Utes. No complete interest of the United States had ever attached itself to the Southern Ute Reservation since it had been reserved to the Southern Utes by the 1880 Act. The 15-mile strip had been administered separately from the ceded Confederated Ute lands opened by the Acts of 1880 and 1882.

The Act of 1880 was not self-executing as it related to the immediate cession to the United States by the Con-

[37] See *Ute Indians* v. *United States*, 45 C.Cls. 440, 448-449.

federated Bands of any of the lands of the diminished 1868 Treaty reservation. In pertinent part, it might be said, the provisions of the Act of 1880 provided that a sufficient quantity of land be surveyed to allow allotment of the Indians; that each member of each band of the Confederated Utes be allotted; that after allotments all surplus lands would become public lands of the United States and subject to disposal; that the proceeds of such dispositions would be used first to reimburse the United States for its expenses incurred in carrying out the provisions of the Act and to pay the United States for any lands used for allotments and located outside the boundaries of the Ute Reservation at $1.25 per acre. The remaining proceeds, if any, would be held for the benefit of the Confederated Bands in the following proportions: One-third to the Southern Utes, one-half to the Uncompahgre Utes, and one-sixth to the White River Utes.

The Southern Utes were already living within the La Plata River area from which they were to receive their allotments. No action was taken toward allotting them because the Ute Commission recognized that the Southern Utes were not ready for allotments and their lands were not adequate for that purpose. After the Uncompahgre and White River Utes had been removed from Colorado in 1881, the settlers entered without legal authority the lands in Royce Area 616 formerly occupied by those two bands. As the lands in Royce Area 616 were to be available to public entry only *after* allotments to the Indians, additional action by Congress was necessary. This action was taken by Congress by the Act of July 28, 1882, 22 Stat. 178, which provided:

> "That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limita-

tions of section three of the act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act."

It is essential to note that under the 1882 Act, the proceeds to be derived from the sale of Royce Area 616 lands were to be divided pursuant to the agreement ratified in the Act of 1880. This reconfirms the joint Confederated Bands ownership of that land.

The 1882 Act did not modify the Act of 1880 as to the Southern Utes; it merely executed its provisions as to the lands vacated by the Uncompahgre and White River Utes, *i.e.*, Royce Area 616. The 1882 Act recognized that the Act of 1880 was executory as to the lands then occupied by the Southern Utes, for by Section 2, it provided (22 Stat. 178):

> "That the Secretary of the Interior shall, at the earliest practicable day, ascertain and establish the line between the land mentioned in section one of this act and that now or lately occupied by the Southern Utes in said State; and for that purpose there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of five hundred dollars."

C. *The 1888 and 1895 Acts Demonstrate That the Southern Ute Lands Were Not Ceded by the Act of 1880*

Congress allowed things to remain this way until 1888. The Commissioner of Indian Affairs was concerned with the problem of protecting the Southern Utes, *i.e.*, preventing non-Indians from entering upon or crossing the Southern Ute Reservation. Although legislation to allow non-Indian settlement of the Southern Ute Reservation was considered during each session of Congress, but one, after

1880, it was not until 1888 that Congress took some positive steps to deal with the Southern Utes.

Section 4 of the Act of 1888, 25 Stat. 113, authorized the Secretary of the Interior to appoint a commission with authority to

> ". . . [N]egotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of *their reservation*, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; . . ." (25 Stat. 113, 133).

The Commission thereafter negotiated an agreement with the Southern Ute Indians. It provided for a cession by the Southern Ute Indians of all their right, title and interest in the Southern Ute Reservation in return for a new reservation in the Territory of Utah. Even if we ignore what went on before, the 1888 Act was passed with Congressional knowledge of the separation of the Southern Utes as an entity from the Confederated Bands of Ute Indians by the Act of 1880 and recognized that they were in full possession and ownership of the Southern Ute Reservation pursuant to that Act. This constituted further Congressional recognition that Royce Area 617 remained the sole property of the Southern Utes. The Court of Claims noted, correctly, that "The agreement which emerged pursuant to this [1888] act substantiates this view." A. 80.

The government omitted discussion of the 1888 Act and the agreement negotiated thereunder in its presentation

to the Court of Claims and plays it down here by merely mentioning that "The Tribe agreed to give up its rights in its former reservation to remove and settle upon a reservation in Utah." Br. 8. But this vital link in the history of the Southern Ute Reservation and its implications cannot be glossed so easily. The Court of Claims had this explanation: [36]

> "A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory."

Although negotiated by special direction of Congress, the 1888 Agreement failed of ratification by Congress and was, in fact, "annulled" by the Act of February 20, 1895, 28 Stat. 677, which was passed in lieu thereof. The 1895 Act, in section 1, provided that the "treaty" of 1880 "be carried out as herein provided, and as further provided by general law for settling Indians in severalty." A. 133.

If, as the United States claims, all of the Southern Ute 15-mile strip was ceded by the Act of 1880, it must rely on an interpretation that the 1895 Act executed the Act of 1880, just as the 1882 Act executed the 1880 Act as to the Uncompahgre and White River area to the north. But the 1895 Act, despite the pronouncement in the preamble, did not do that. The 1880 Act related to lands held by the Confederated Bands of Utes; the 1895 Act dealt only with lands owned by the Southern Utes.

First, the 1895 Act provided for a division of the Southern Ute Reservation between allotted and unallotted members. Section 3 states, A. 134:

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[36] A. 80. As to the former White River and Uncompahgre areas, the 1882 Act had operated to place the lands therein within the public domain, make them subject to entry under the public land laws, and thus implement or "execute" the Act of 1880 as to those lands. 22 Stat. 178.

> "That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of [a described boundary] . . . ."

Language such as this, whether in a treaty or act of Congress, has long been held to recognize the complete and absolute ownership of the land to the exclusion of all others, and where other Indians are put on such lands, the United States has taken an interest in the lands. *Shoshone Tribe* v. *United States*, 299 U.S. 476. Thus, as to the unallotted Southern Utes, a separate and solely-owned, defined reservation was set aside for them. No other Indians could have had an interest in that land under the language of Section 3 of the 1895 Act. Since the unallotted Southern Utes were to hold their sole reservation, then surely the allotted Southern Utes were to have "their interest in all tribal property" outside that reservation. This was the *quid pro quo*, and the basis of the fair dealings in the 1895 Act providing for the two groups of Southern Utes.

Section 5 provided for payment by the United States to the "said Indians" out of the moneys first realized from the sale of the "opened" lands as follows: $5,000 annually for ten years per capita to "all of said Indians"; $20,000 to the Secretary of the Interior for investment in sheep to be divided among "said Indians per capita"; and $500 to the principal chiefs, including the chief of the Weeminuche. The balance, after deducting the expenses of sale and survey, was to be held in the Treasury "in trust for the sole use and benefit of said Southern Ute Indians." A. 135-6.

Finally, Congress provided that the Act of 1895 must be ratified by a majority of the adult males of the Southern Ute Tribe. This was further Congressional recogni-

tion that the 15-mile strip was solely Southern Ute land, for it did not follow the requirement of the 1868 Treaty or the Act of 1880 that disposition of Confederated Ute lands be approved by a three-quarters vote of all male adults of the White River, Uncompahgre and Southern Ute Bands.

This interpretation of the 1895 Act precludes the government's assertion that the lands involved were ceded by the Act of 1880, for they were disposed of specifically pursuant to the terms of the 1895 Act.

Thus it is clear that the 1895 Act, so far as the 15-mile strip is concerned, universally acknowledged and referred to prior to 1895 as the Southern Ute Reservation, completely recognized the Southern Ute ownership in the lands opened to public entry under its provisions, as contrasted to the jointly owned lands ceded by the Act of 1880. No other construction can be made of the 1895 Act. Whatever the import of the 1895 Act, *viz-a-viz*, the Confederated Bands as a whole and the Southern Utes (Capote, Muache and Weeminuche Bands) or the obligations and liabilities of the latter three bands each to the other,[29] it is inescapably clear that so far as the lands and proceeds from lands opened under the 1895 Act are concerned, the Southern Utes alone owned the right to the property.

D. *The Legislative History Does Not Support the Government's Contention that the Southern Ute Reservation Was Ceded by the Act of 1880*

The government contends that it was the intent of Congress by the Act of 1880 to eliminate all Indian reserva-

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[29] We also asserted in the court below that the 1895 Act worked a cross-relinquishment of interests between the allotted Southern Utes, who are now organized as the Southern Ute Tribe, respondent here; and the unallotted group now organized as the Ute Mountain Ute Tribe, which was the sole beneficiary of the lands set aside under Section 3 of the 1895 Act. See *supra*, pp. 8-9, 20-1.

tion lands from the State of Colorado. It cites the debates in Congress preceding the Act to support its contention that the Act of 1880 did not reserve a reservation for the Southern Utes or "recognize that they continued to possess one." [40] Reference to the debates, however, shows that while the members of Congress were in reasonable agreement that they were referring to one total area comprising more than 15,000,000 acres, they were not at all unanimous or certain that the bill under debate was intended to or could accomplish removal of the Southern Utes. Possibly, some confusion was traceable to the attitude of Senator Teller of Colorado, who was insistent that the Confederated Bands, including the Southern Utes, not be permitted to remain in Colorado and complained that the basic scheme of the Act of 1880 would result in preservation of Indian reservation life in Colorado.[41]

Congress next took action, following the Act of 1880, with regard to the Ute Reservation in Colorado in 1882. On January 9, 1882, it adopted Senate Resolution 21, which directed the Secretary of the Interior to inform the Senate: [42]

> ". . . [W]hether further legislation is necessary to open for settlement under the preemption laws of the United States that part of the Ute reservation in the State of Colorado *not assigned to the Southern Ute Indians* by the provisions of the act of June 15, 1880; also whether the land on which said Southern Ute Indians are by the provisions of said act to be placed

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[40] Br. 6-8. The basis of the government's argument that the claim in suit is barred by *res judicata* seems sound only if the lands involved were ceded unconditionally by the Act of 1880. In arguing that this was achieved, the government claims support from the legislative history of the 1880 Act and other Acts. Br. 21-22.

[41] H. Rept. 1401, 46th Cong., 2d Sess., to accompany S. 1509, pp. 4-7. Secretary of the Interior Schurz disagreed with Senator Teller. *Id.*, at 7.

[42] 13 Cong. Rec. 266.

is suitable as a permanent home for the said Indians."

The Secretary of the Interior responded to Resolution 21 in a report to the Senate Committee dated February 14, 1882. The response is contained in Senate Ex. Doc. No. 108, 47th Cong., 1st Sess. The Secretary summarized an opinion of the Attorney General dealing with the inquiry of Senate Resolution 21 in these words:

> "It will be seen by his letter . . . that in his opinion this cannot be done under existing law; hence, if it be done at all, additional legislation is necessary." *Id.*, at 1.

Explaining that the Uncompahgre and White River Utes had been moved to Utah, and that there was some dissatisfaction and restlessness on their part, the Secretary of Interior advised the Senate that he felt

> ". . . constrained . . . to say in this condition of affairs I seriously doubt the propriety of opening the lands in question at the present time. To take this action before the Indians shall have received all that they are to receive as a consideration for the surrender of their former homes, may tend to increase still further their present discontent, and may be used by mischievous men to that end." *Id.*, at 2.

Turning to the problem of the Southern Utes, the Secretary said:

> ". . . it appears, from the report of Hon. George W. Manypenny, the Ute Commissioner, who, during the last year's [1881] operations, had special charge of the operations of the commission touching the Southern Utes, that there is not sufficient land of the character required to carry out the stipulation with these Indians in the region of country now occupied by them; . . .
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> * * * *
>
> "It is not at all unlikely that negotiations will have to be entered into with the Southern Utes for

> their removal from Colorado, and legislation is understood to be now pending before Congress looking at such end. This would then be an additional reason for withholding any legislation looking toward the opening up of their lands until such steps as Congress may see fit to take in relation to the final settlement of the Southern Utes is fully determined and completed." *Id.*, at 2.

In the opinion furnished the Secretary, the Attorney General said the lands of the Ute Indian Reservation in Colorado could not be opened for settlement under the Act of 1880 until allotments in severalty had been made to the Indians as provided by that Act, because until the lands were allotted, it could not be precisely known what lands would be subject to entry. Therefore, the lands could not be held and deemed to be public lands subject to disposal under appropriate law until allotments had been selected for the Indians and the report of the Ute Commission approved by the President. He concluded, as indicated above, that additional legislation would be necessary to open the White River and Uncompahgre areas of the Reservation to immediate settlement and disposal. *Id.*, at 4.

The Secretary also attached to his letter a letter from the Commissioner of Indian Affairs, dated January 27, 1882, and written in reply to questions generated by Resolution 21. The Commissioner recommended that "lands for the permanent settlement of the Southern Utes be given them elsewhere than as provided in the said [1880] agreement." *Id.*, at 6.

The bill which became the Act of July 28, 1882, 22 Stat. 178, was S. 698. The Senate Report on that bill, No. 186, 47th Cong., 1st Sess., followed in time Executive Document No. 108. *Supra.* The report explained that the White River and Uncompahgre Utes had been removed to Utah Territory during 1881 and then made this statement:

"It is clear that by the terms of this [1880] act, the lands formerly occupied by the Uncompahgre and White River Utes cannot be held to be public lands, subject to disposal, without further legislation, until the lands of the new reservation shall have been surveyed, and the allotments to the Indians shall have been made and patents issued, etc. As some of these Indians are opposed to accepting their lands in severalty, it may be several years before the work of making the allotments will be completed. Under the most favorable conditions, it probably cannot be done in less than two years." *Id.*, at 2.

The report pointed out that non-Indians had poured into Colorado since the Uncompahgres and White Rivers had moved to Utah, that it was only fair to the settlers that the Colorado areas be thrown open to settlement, and the Commissioner of the General Land Office reported that he knew of no objection to opening such land if the Indian rights to allotment within the limits of the reservation formerly occupied by the Uncompahgre and White River Utes had been satisfied by action of the Secretary of the Interior.[43]

The problem of the Southern Utes remained with Congress thereafter and each session of Congress saw many bills introduced relating to Indian lands in Colorado.[44]

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[43] S.Rept. No. 186, 47th Cong., 1st Sess., p. 2. There was no mention of the Southern Ute Reservation. The discussion and reports involving the 1882 Act and its legislative history are consistent in showing: (1) Congress in 1882 considered that the 1880 Act was executory in nature; (2) subsequent legislation was needed to complete execution of the 1880 Agreement and open the 1868 Reservation to public settlement; and (3) a reserved area for the Southern Utes was created by the 1880 Act and it remained a Southern Ute Reservation until legislative action (opening lands to disposal in 1895) and administrative action (allotting after 1895) had been achieved.

[44] The one exception was the Second Session of the 47th Congress, in which no bill was introduced.

In 1886, S. 1916 was introduced by Senator Bowen of Colorado.[45] The Senate Report (No. 836, 49th Cong., 1st Sess., April 30, 1886, to accompany S. 1916) contains revealing background information. It includes the testimony of Southern Ute chiefs that they owned their reservation by statute, that they wanted to move because of white encroachments, and they believed legislation to be necessary because their reservation was held under recognized title (by treaty or statute). The second section of S. Rept. No. 836 contains this quotation from a letter of April 5, 1886, from the Commissioner of Indian Affairs to the Secretary of the Interior:

> "Accordingly, I have the honor to state that it is the declared wish of the Southern Ute Indians to remove from their present reservation; but it appears they do not desire to become consolidated with or settle amongst either of the other Ute [Uncompahgre or White River] tribes. They are very much dissatisfied with their present reservation and the first proposition looking toward their removal came from the Indians themselves. This dissatisfaction is due in large measure to the disadvantages arising from the unfortunate position and configuration of their reservation, which is 110 miles in length by only 15 miles in width. . . ." *Id.*, at 3.

During the first session of the 50th Congress (1887) additional bills to remove the Southern Utes from Colorado were introduced. S. 104 (19 Cong. Rec. 21) and H.R. 1265 (19 Cong. Rec. 208) were two. The House Report on H.R. 1265 (H. Rept. 861, 50th Cong., 1st Sess.) contained a favorable recommendation from the Commissioner of Indian Affairs and the Secretary of the Interior. They reported that the three principal chiefs of the Southern Utes had come to Washington during the first session of the 49th Congress (1886), by direction of the Commissioner of Indian Affairs, and testified before

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[45] 17 Cong. Rec. 2521.

the Senate and House Committees on Indian Affairs that they wished to be removed from their present reservation in southwestern Colorado to a new reservation in the Territory of Utah. The Committee Report pointed out the territorial inadequacy of the Southern Ute Reservation, intermingling of sheep and horses belonging to the whites and the Indians, and concluded that "the peculiar shape and location of the Indians' reservation and the settling up of the country around it, produces continual trouble." H.Rept. 861, p. 10. While the House Committee favored enactment of H.R. 1265, it did so only if three-fourths of the Southern Ute males consented to removal and if the legislation provided the "proceeds arising from the sale of all the lands in their present reservation" were to be set aside in a trust fund for the benefit of the Southern Ute Indians. (H. Rept. 861, p. 9).

Another and definite recognition of the existence of the Southern Ute Reservation is found in action of the Senate. On March 31, 1888, it passed a bill granting a right-of-way to the Durango, Cortez & Utah Railroad Company through the Southern Ute Reservation.[46] Section 3 of the bill provided:

> "That it shall be the duty of the Secretary of the Interior to fix the amount of *compensation to be paid the Indians* for such right-of-way . . . ."

Another section provided:

> "That the President of the United States shall require that the *consent of the Indians* to said right-of-way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this Act shall accrue to said company."[47]

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[46] 19 Cong. Rec. 2546.

[47] *Ibid.* No such requirements would be imposed on land, as the government suggests, set aside merely for the purpose of providing allotments in severalty to individual Indians.

The Commission appointed pursuant to the Act of May 1, 1888, 25 Stat. 133, negotiated an agreement with the Southern Utes for modification of their "treaty or other rights," and made its report, supported by a journal of its proceedings, to the Secretary of the Interior on January 2, 1889. The report included a draft of proposed legislation, which was forwarded to Congress and purportedly followed the agreement negotiated with the Southern Utes, providing that the Southern Ute Indians would "cede, grant, convey and relinquish all right, title, interest, claim, privilege or immunity in and to the Southern Ute Reservation." [48]

A bill (S. 3894) to ratify the 1888 Agreement was introduced in Congress on February 1, 1889, 20 Cong. Rec. 1391, was reported back with amendments, 20 Cong. Rec. 1600, debated, amended and passed the Senate. 20 Cong. Rec. 2284, 2285-2287. No action was taken in the House.

Similar bills were introduced in the next Congress (1890-1). Starting in 1892, there was a discernible shift in Congressional attitude towards the 1888 Agreement, when Senator Wolcott of Colorado introduced a resolution on March 28, 1892, requesting that the President "refrain from allotting in severalty the lands of the present reservation for the Southern Ute Indians." (23 Cong. Rec. 2602). The debate involved consideration of the motivation behind the 1880 Act, including these comments with respect to the Southern Utes: After the "Meeker massacre," the Uncompahgre and White River Utes

> ". . . were hurried off to the Uintah Reservation in Utah, the Southern Utes remaining upon this southwestern strip.
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> "Then 1880 negotiations were had looking to the confining of the Southern Ute Indians some specific

[48] Report of the Commission, Sen. Ex. Doc. 67, 50th Cong., 2d Sess., January 14, 1889, p. 6. The Commission spent almost four months negotiating with the Southern Utes.

reservation. A commission was appointed, and in 1880 this present reservation was made the permanent home and the exclusive abode of the Southern Ute Indians." [49]

A House Committee Report in 1893 on S. 1234 explained that the 1880 Act "provided for the removal of the Ute Indians (except the southern branches of the tribe) from Colorado." H. Rept. 2487, 52d Cong., 2d Sess., p. 1.

By 1894, the appropriate committees in Congress appeared to have abandoned the proposal to remove the Southern Utes to the Territory of Utah and chose, instead, a course of action which contemplated allotments in severalty on the Southern Ute Reservation. This was epitomized in H.R. 6792, a bill introduced by Congressman Hunter of Illinois. 26 Cong. Rec. 4015. The House Report (H.Rept. 799, 53d Cong., 2d Sess.) recommended "allotment of lands in severalty to all who may elect to take them" if deemed by the Secretary of the Interior qualified "to sustain themselves in a changed position in which they would be placed after taking lands in severalty." *Id.*, at 3.[50] This bill appears to have been the first one to provide for establishment of a separate reservation for the unallotted Southern Utes in the western end of their 15-mile strip. *Id.*, at 3. This bill was passed by the House. 26 Cong. Rec. 6232. When it was debated in the Senate, Senator Teller, in charge of the bill, explained that it "simply carries out the Treaty of 1880, with modifications." He explained that the Southern Utes might select allotments and those not selecting were to be settled on the western end of their existing reservation. 26 Cong. Rec. 6388.

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[49] 23 Cong. Rec. 2636. This was the explanation by Senator Wolcott, who also explained that Senator Teller, in 1880, had protested against the assigning of the Southern Utes to the Southern Ute Reservation.

[50] The Committee was well aware of the fact that the Southern Utes theretofore had been occupying the 15-mile strip as an Indian reservation.

This debate revealed a difference of opinion between Senator Teller and Senator Vilas, the latter being the Secretary of the Interior at the time of the 1888 Agreement. Senator Teller maintained the 1880 Act provided only that the Indians were to be allotted in severalty, and the remaining lands were to be sold. Senator Vilas expressed the opinion that the Act of 1880 created a reservation for the Southern Utes. 26 Cong. Rec. 6388. H.R. 6792, as amended, was adopted by both Houses and became law during the third session of the 53d Congress upon approval by the President on February 20, 1895. 28 Stat. 677.

Any fair analysis of the legislative history of the Acts of 1880, 1882, 1888 and 1895 must lead to the conclusion that the Southern Ute area was reserved for them by the 1880 Act; their ownership was further recognized by the Acts of 1882 and 1888; and the land was unqualifiedly treated as Southern Ute property by the Act of 1895.

E. *The Claims in Suit Were Not Involved in Any Prior Ute Litigation*

Although the government does not seriously contest the fact that neither the Southern Ute Tribe nor any other Ute Indian group for that matter has ever been paid for the free homestead land involved in this case, the defense of *res judicata* against failure to make payment for lands taken in violation of the 1895 Act is based on an erroneous interpretation of the Act of 1880 and prior litigation involving rights of the Confederated Bands of Ute Indians jointly. While pointing to other cases during previous stages of this proceeding, the prior cases primarily relied on at this time are Court of Claims No. 46640, *Confederated Bands of Ute Indians* v. *United States*, 117 C.Cls. 443, and for historical perspective, No. 30360, *The Ute Indians* v. *United States*, 45 C.Cls.

440.[51] *Supra*, pp. 10-11, 13-16. These cases, says the government, dispose of the present claim of the Southern Ute Tribe alone by *res judicata*, or, perhaps more accurately, collateral estoppel.[52] But whichever court-made rule of repose is advanced, the government is equally wrong on either count.

Classically, the principal elements which determine whether the present claims are barred are: were the parties to the prior suits the same and were the issues (and necessarily the facts to establish them) the same. Here, they were not. The elements and the test of application have been stated by this Court in *Tait* v. *Western Maryland Ry. Co.*, 289 U.S. 620, 623:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48; *United States* v. *Moser*, 266 U.S. 236, 241."

We have previously reviewed the pertinent litigation by the Confederated Bands of Ute Indians involving

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[51] The government identifies the confederation of Uncompahgre, White River and Southern Ute Tribes as the "Confederated Band of Ute Indians." Br. 4. This confederation has always been known as the "Confederated Bands of Ute Indians." It is so listed by the government in its table of citations. Br. ii. Counsel is not aware that any legal significance attaches to this change in name adopted by the government.

[52] We are inclined to the view that the distinction in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326, is correct if the doctrine is applicable at all.

rights under the 1880 Act. *Supra*, pp. 10-17. The Southern Utes (Capote, Muache, and Weeminuche Bands as of 1880 and later) were a constituent part of the Confederated Bands and were so treated from at least the Treaty of 1868 in which those bands reserved for themselves the western portion of Colorado, 15 Stat. 619. The Southern Utes shared in the judgments of all cases brought by the Confederated Bands in an amount usually proportionate to the percentage their population bore to the entire confederation.

This is the one and only suit brought by the Southern Ute Tribe as a party for its own interest in the 15 by 100 mile strip reserved, as we say, by that tribe pursuant to the Act of 1880 and disposed of for its sole benefit by the United States as authorized by the Act of 1895. No other bands of the Confederated Utes have claimed an interest in the Southern Ute Reservation, and any award in this claim would go to the Southern Ute Tribe alone.[53] Each of the prior cases, in which the Southern Utes were a constituent part of the Confederated Bands in an adversary posture with the United States, involved lands outside the 15-mile strip and interests which the bands shared jointly, with the exception, as yet undetermined in amount, of the 1910 accounting case. *Supra*, pp. 10-11. Thus, the parties in all prior cases were different. That difference is between the joint and sole ownership of Indian lands and money.

The issues in this claim are not the same as the prior claims of the Confederated Bands. All prior litigation turned on rights under the Act of 1880 and the accrued monetary interests as therein provided. Upon disposal of lands under the Act of 1880, but first "sacredly" reimbursing itself for certain pro-governmental expendi-

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[53] The government and one dissenting judge of the Court of Claims have been led to believe that there was a defect in parties in the present claim. The issue has been decided to the contrary and has not been challenged. Br. 4, fn. 1; 37, fn. 18.

tures assertedly benefitting the Indians, it was provided that "the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians" with interest. Br. 47. Plainly, the "said Indians" were the joint beneficiaries of the agreement ratified and amended by the Act of 1880—which included the Southern Utes as a constituent part of the Confederated Bands. But the beneficiaries were jointly the Confederated Bands.

The 1895 Act is different. The clear import of the 1895 Act, so far as the 15-mile strip is concerned, is that it completely accorded to the Southern Utes the total ownership interest in the lands opened to public entry and moneys received under its provisions as opposed to the lands opened by the Act of 1880. No other construction can be made of the 1895 Act.

On this basis, the Southern Ute Tribe sued for the proceeds of land disposed of in the Southern Ute Reservation (the accounting claim for 82,000 acres) and payment for the 230,000 acres of free homestead lands, which the United States had disposed of in violation of the 1895 Act which required the payment of $1.25 per acre for that kind of land. A. 134-5. Thus, the element of identical issues for *res judicata* is not present. There was no issue in any of the prior litigation raised or pleaded or which could have been raised that the Confederated Bands were entitled to compensation for or the proceeds from the lands in suit opened under the 1895 Act.

In its treatment of prior Ute litigation (Br. 10-13, 24-29), the government quotes some general language of this Court and the court below as to what it thinks is involved in the Act of 1880. With the possible exception, as we point out, of *part* of the 1910 accounting claim, every other citation is to *dicta*. Br. 25. The Executive Order lands claim (Br. 11-12, 25; *supra*, p.

16) was for compensation for lands in which the Confederated Bands were held to have no compensable interest. Nothing remotely akin to this 1895 Act claim for lands and proceeds held in trust for the Southern Utes was before the Court in that case. And the language cited cannot be the predicate for *res judicata*. *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 278-9; *Mutual Orange Distributors* v. *Agricultural Prorate Com'n.*, 30 F.Supp. 937 (S.D. Cal., 1940).

In its reaching to convince this Court that the Act of 1880 ceded all Ute lands in Colorado, including the 15-mile strip, the government goes so far as to claim that a brief filed by counsel for the Confederated Bands in the Executive Order case just mentioned supports this interpretation. Br. 11-12. Its citation is to a brief filed on behalf of the Confederated Bands in this Court, No. 141, O.T., 1946, pp. 8-9 and 15-16. As the government acknowledges, the remarks were made in another context. But even so, they hardly support the claim made by the government in any event. The briefs cited are to the same Executive Order lands claim. *Supra*, p. 16. That case involved no question under the 1895 Act, and the Act of 1880 was primarily important for historical purposes. With respect to the effect of the 1882 Act, the brief on behalf of the Confederated Bands had the following to say:

> "Subsequently, the lands to be allotted to the individuals not having been selected, doubts existed whether settlers could make entry of the lands in the former reservation in Colorado. To remove these doubts, Congress declared by the Act of July 28, 1882, . . . that the lands formerly occupied by petitioner bands other than those set apart for the Southern Utes by the Agreement of 1880, were 'public lands of the United States,' subject to disposal in accordance with the agreement of 1880."

(Brief for petitioners, p. 9; see also Petition for Certiorari, p. 7).

Elsewhere in the brief are cautious and accurate statements to the effect that the Act of 1880 operated as a cession in trust for the benefit of the Indians.

Lastly, but by no means least, none, not one single acre, of the 230,000 acres given free as homesteads in violation of the 1895 Act was paid for in any of the prior litigation, and the government is well aware of this fact. The judgment in No. 46640 which is for the most part completely relied upon for *res judicata* did not cover the 1895 Act land disposals. It is a mathematical certainty that no money in that judgment was for these 230,000 acres. *Supra*, pp. 13-16.

To escape its obligation to pay for the taking of the 230,000 acres, the government relies on a single sentence in the 1950 stipulation in No. 46640 as its juridical *res*. That sentence, quoted by the government without reference to the whole (Br. 20), provides that the 1950 judgment was *res judicata*[54]—

> ". . . not only as to the land described in Schedule 1, but whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant . . . sold for cash, disposed of as free homesteads and set aside for public purposes."

The two dissenting judges in the court below accepted this language as dispositive of the issues here presented and the government's position before this Court stands on that cornerstone (Br. 24-29). It is that sentence,

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[54] By merely using the term, we would think today that the parties were correctly using it to mean the exact lands on which the computation was based and not other lands involving an owner different from the joint beneficiaries of that award.

quite reasonably a catch-all, on which the government hangs its entire defense.

An examination of the face of the stipulation shows that the subject 230,000 acres could not have been included in the catch-all sentence. If the Southern Ute Reservation, including the 230,000 acres of subject land, had been ceded under the Act of 1880, then surely that Act, coupled with the amendments of the Act of 1882, would have been the authority for the United States to dispose of the lands and thus create for itself the obligation to account for proper dispositions and a liability for improper disposals. The subject 230,000 acres were not disposed of under the Act of 1880, but under the Act of 1895. Since the government did not dispose of the 230,000 acres under the Act of 1880, there was no wrongful disposition for which it could be liable, as it was for the 1.6 million acres paid for in No. 46640.

The claim in No. 46640 was not for the loss of the Southern Utes' right to lands and proceeds under the 1895 Act, but for the Confederated Bands jointly for lands and proceeds under the 1880 Act, and it was that action, and that action only, which was settled by the 1950 stipulated judgment. *Supra*, pp. 13-16.

The government must have looked at Case No. 46640 the same way. At the time the basic litigation under the 1938 jurisdictional act was pending, the Secretary of the Interior on September 14, 1938, pursuant to the recently passed Indian Reorganization Act of June 18, 1934, 48 Stat. 984, moved to restore to the ownership of the Southern Ute Tribe all of the lands which had been opened to entry under the 1895 Act but which still in 1938 had not been disposed of. The order of restoration is revealing. *Supra*, p. 9. It provides as follows:[55]

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[55] *Indian Affairs, Laws and Treaties*, Vol. V, p. 659, Charles J. Kappler.

> "... pursuant to the provisions of the Act of February 20, 1895 ... the *Southern Ute Band* of Indians in Colorado *ceded* to the United States a large area of *their reservation* in the State of Colorado *established expressly* for their benefit *under the treaty of June 15, 1880* ..."

The court below accorded this 1938 statement in the restoration order great weight. A. 85. It was not the only such statement indicating that the Secretary of the Interior construed the 1895 Act as ceding the Southern Ute Reservation. As early as 1903, the Acting Secretary of the Interior had held that the Southern Ute Reservation was in fact created by the Act of 1880 and the 1895 Act alone made those lands subject to disposal. *Hiram M. Hamilton*, 32 L.D. 119. Referring to the proper manner of disposing of the opened Southern Ute Reservation lands, the Acting Secretary stated (*Id.*, at 119):

> "*The tracts* in question *are* within the territory included in the Ute Indian reservation established by the treaty of March 2, 1868 (15 Stat., 619), and *within the reservation, established in pursuance of the provisions of the agreement with said Indians, approved by the Act of June 15, 1880, supra, for the Southern Utes.* They never came under the operation of the provisions of said act of 1880 in respect of the disposal of the lands ceded by the agreement thereby ratified."

A further example of this consistent interpretation is shown in the Secretary's regulations under the 1920 Mineral Leasing Act, 41 Stat. 437, 30 U.S.C. 181, *et seq.* The regulations specifically excluded Indian reservations. But the Secretary held that the lands ceded by the Confederated Bands by the Act of 1880, and opened to settlement by the 1882 Act, were subject to the Mineral Leasing Act as public lands. *Frank A. Kemp*, 47 L.D. 560. The first regulations under the 1920 Mineral Leasing Act specifically included the "ceded Ute Indian lands" as subject to leasing, as well as other Ute lands. *Oil and*

Gas Regulations, March 11, 1920, 47 L.D. 437, 474. But once again, the Southern Ute Reservation lands were conspicuously absent from the lands identified as ceded by the Act of 1880.

The position of the three Secretaries was completely consistent and was made directly in response to issues affecting the Southern Utes under the Act of 1880 and the 1895 Act. It reflects consistent administrative construction of the two acts of Congress by the administrative officers charged with carrying out the provisions of the acts. As such, the administrative interpretation is entitled to considerable weight.

F. *Any Ambiguity or Uncertainty in the Act of 1880 Must be Resolved in Favor of the Southern Utes*

This is not an ordinary suit. Here the United States sits in a dual capacity. The United States on the one hand has its role as guardian of its dependent Indian wards and as trustee of their property; on the other hand, the United States is defending itself on charges of wrongdoing. Different policies control the two functions and the governmental officers on each side have different obligations.

In this case, the United States is dealing with Indian wards to whom it owes a special obligation. By law, the tribe was prohibited from selling to anyone but the United States (Act of July 22, 1790, c. 33, 1 Stat. 137) and, by law, the United States has the obligation to administer the property of its wards for their advantage.

The principles governing disputes between the United States and its tribal wards are well summarized in *Choctaw Nation* v. *United States*, 119 U.S. 1, 28, where the Court stated:

> "The recognized relation between the parties to this controversy, therefore, is that between a supe-

rior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. *The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right*, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws."

In varying form, this same view has been expressed in numerous decisions of the Court. Speaking of the Shoshone Tribe, the Supreme Court made the judicial pronouncement that it is "the settled policy of the United States fairly to deal with Indian tribes." *United States v. Shoshone Tribe*, 304 U.S. 111, 116. More specifically, the Court directed that in dealings between the United States and its wards concerning property all doubts are resolved in favor of the Indians. The Court stated (304 U.S., at 116, 117):

> "[116] . . . In treaties made with them [Indian tribes] the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. *They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.* . . ."
>
> "[117] . . . As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe."

In language applicable here, this was reiterated in *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 354, where this Court declared:

> ". . . But an extinguishment [of title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate* v. *Trapp*, 224 U.S. 665, 675, the rule of construction recognized *without exception* for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.' "

In *Minnesota* v. *Hitchcock*, 185 U.S. 373, 402, the Court made it "a *duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress.*"

And as long ago as 1832, Mr. Chief Justice Marshall stated the controlling precept in *Worcester* v. *Georgia*, 6 Pet. 515, 582, that: [56]

> "The language used in treaties with the Indians should *never* be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

If there is uncertainty or ambiguity concerning the question whether the Southern Ute Reservation was "reserved" or set apart or recognized by the agreement and Act of 1880, then the Congressional action taken with annual knowledge of administrative recognition that the 15-mile strip belonged to the Southern Utes must be construed in the manner favorable to the Southern Utes.

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[56] Quite recently, Chief Justice Marshall's words in *Worcester* v. *Georgia* were reaffirmed by this Court in *Squire* v. *Capoeman*, 351 U.S. 1, 6-7.

Particularly is this true where the meaning the Indians attributed to the agreements or acts is called to question. *Menominee Tribe* v. *United States*, 391 U.S. 404, 406; *United States* v. *Winans*, 198 U.S. 371, 380-381. In *Winans* (198 U.S. at 380-1), the Court said:

> ". . . [W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right *without regard to technical rules.*' "

The Southern Utes alone owned the 15-mile strip at all times after 1880. What other conclusion can be reached when considering the entire web of events between the Southern Ute's ratification of the Act of 1880, their Congressional hearing in 1886, their cession agreement of 1888, and the provisions of the Act of 1895 passed for their sole benefit. *Supra*, pp. 20-40. Any other construction of the Congressional action would fly directly in the face of precepts set out by the Court without exception.

II. Respondent Is Entitled to a True, Complete and Proper Accounting to the Date of Judgment for Trust Funds Derived from the Sale by the United States of Approximately 82,000 Acres of its Land and Interests

The respondent pleaded a claim for an accounting of the proceeds from approximately 82,000 acres disposed of by the United States pursuant to the 1895 Act, and prayed that the government "render a true, complete and proper accounting" for those trust funds. A. 13.[57]

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[57] Throughout its brief, the government pointedly criticizes respondent for filing the original petition before the Indian Claims Commission a mere three days before the cut-off date and filing twelve years later pleadings on the accounting claim. The govern-

The government did supply, on February 18, 1953, a report of the General Accounting Office (GAO) purporting to furnish that accounting. In its May 29, 1956 answer to the petition, the government's defense to the accounting claim (other than a general denial) was *res judicata*. A. 14-15. The following years to November 4, 1960, were consumed with motions for summary judgment on certain issues. These motions were denied by the Indian Claims Commission. A. 1. Thereafter, on June 12 and September 30, 1963, the respondent filed exceptions to the GAO report in preparation for the scheduled hearing held by the Indian Claims Commission on October 8-9, 1963. A. 19-23.

A. *The Petitioner Must Furnish a Complete and Proper Accounting*

Section 4 of the 1895 Act authorized for the first time the disposal by the United States of lands "within the present reservation" of the Southern Utes and Section 5 of that Act provided that "the money realized from the sale of lands, . . . shall be held in the Treasury of the United States in trust for the sole use and benefit of" the Southern Ute Indians. A. 134-6. The relationship of the parties under the 1895 Act thus ". . . was special and from it there stemmed a special responsibility." *Oneida Tribe* v. *United States*, 165 C.Cls. 487, 493-494; *cert. den.*, 379 U.S. 946; see also *Navajo Tribe* v. *United States*, 176 C.Cls 502, at 507. When the government

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ment seems to be implying that the exceptions were afterthoughts of counsel. Br. 29-30. They were not, of course, and we suppose that if the original petition had been filed on the first or the last day the Commission could have received it, and if the exceptions to the GAO report had been filed the day after the respondent received it, these issues would nonetheless be the same. The government filed approximately 15 motions for extensions of time to answer the petition between 1951 and 1956.

promises to sell lands in their "present," *i.e.*, existing, reservation for the trust account of the Southern Utes, "The law requires what is called uberrima fides, the highest good faith, in matters of this kind." *Ottawa Tribe* v. *United States*, 166 C.Cls. 373, 380; *cert. den.*, 379 U.S. 929.

The respondent's exceptions to the 1953 GAO report, contrary to the government's theory, raise accounting issues entirely related to the claim pleaded. Each of the exceptions, save one, goes straight away to the government's mishandling of the trust funds derived from disposals of the 82,000 acres of Southern Ute reservation land under the 1895 Act, as revealed by the GAO report prepared on this claim. The exceptions assert in this accounting claim principles long established in cases involving Indian trust funds collected by the United States from the disposals of tribal lands and natural resources. The exceptions simply make specific the government's mishandling of respondent's money as shown from the incomplete GAO report in this case. Since the petitioner never tells the Court what the exceptions cover, except for one item which was actually rejected by the Indian Claims Commission and affirmed by the court below, we are constrained to detail in somewhat more length than might otherwise be thought necessary the exactness with which the exceptions apply to the pleaded claim.

1. *The United States owes respondent a duty to conserve, make productive, and protect its trust funds.* The petitioner is duty-bound in the course of prudent management of Indian trust funds to conserve such funds by using noninterest-bearing funds ahead of any interest-bearing funds and by using those bearing a lower rate of interest ahead of those bearing higher rates of interest. If this duty is not fulfilled, there is an obligation to reconstruct the account and to pay the respondent the

amounts lost. *Menominee Tribe* v. *United States*, 101 C.Cls. 10, 20-1. As an integral part of its duty to conserve runs a duty to make trust funds productive, which is fulfilled by depositing the collected proceeds promptly in interest-bearing accounts, where the law requires the payment of interest, and to continue to pay interest until the funds are actually spent for the benefit of the tribal ward. *Ibid.*; *Menominee Tribe* v. *United States*, 107 C. Cls. 23, 33. If interest is not paid as required by law, the government is obliged to recompute the account and credit the amount so lost. *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 801-2.

Protecting the trust fund means, among other things, that the government must expend the money for the account and benefit of its Indian ward and not spend such funds for governmental functions of its own which by law it is required to maintain in any event. *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 801-2; *Cherokee Nation* v. *United States*, 102 C.Cls. 720, 766-8; *Menominee Tribe* v. *United States*, 101 C.Cls. 10, 20-1; and see *Menominee Tribe* v. *United States*, 118 C.Cls. 290, 326-7.

It was these general principles which guided the Commission, and no doubt the court below in its affirmance, when it entered its ultimate Finding 20 on the accounting matter as follows (A. 35-6):

> "20. Petitioner [Southern Ute Tribe] is entitled to recover the total amount by which its funds would have been increased (1) through the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not

been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest."

Examples of each of these breaches by the government, as shown by the GAO report in this case, were supplied by respondent in the form of "exceptions" shortly before the 1963 trial before the Indian Claims Commission.

a. *The government failed to deposit the Tribe's trust funds promptly upon receipt as required by law. Exception 1. A. 19.* If the Tribe's moneys had been promptly credited to the appropriate interest-bearing account, they would have become productive without undue delay and within the 30 days heretofore adjudicated to be reasonable for the government to get "through the entire maze of administrative red tape preliminary" to depositing money in the United States Treasury.[58] Because the GAO report in this case does *not* show when the funds were received or actually deposited, and additionally shows that over thirty years passed from the time some of the funds were deposited before the government began paying any interest, the Commission ordered the government to supply the deposit-date information, "insofar as the records will permit." A. 48.

b. *The government failed to pay interest on interest-bearing funds up to the time such funds were actually spent. Exception 2. A. 19.* As an administrative practice, the government stops the payment of interest on interest-bearing funds when they are "transferred" to a disbursing officer's account, even though such funds are still on deposit in the Treasury and the actual expenditure of the funds may come at a much later date

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[58] *Menominee Tribe* v. *United States*, 107 C. Cls. 23, 33. The Court of Claims has held that there is an implied agreement on the part of the United States to deposit such funds promptly and that 30 days is a reasonable time to accomplish this. The Commission followed that ruling for this case. A. 48.

or not at all.[59] During this time, the government has the free use of the Tribe's money. The failure to pay interest up to the time the trust funds are actually spent caused a loss to the Tribe and violated the government's duty to keep the trust funds productive. *Supra*, pp. 53-4. On this record, the Commission held that the government was under a duty to furnish the deposit-withdrawal dates so that the correct interest-bearing time periods could be computed, "insofar as possible." A. 48-9.

c. *The government failed to pay interest on the trust funds as required by law. Exception 3. A. 19.* On its face, the 1953 GAO report shows that land sale proceeds had been collected pursuant to the 1895 Act starting on April 13, 1899, and that it was not, strangely enough, until after February 12, 1929, that any interest was paid on these funds. A. 136-9.[60] Federal law provided that interest at five per centum per annum be paid on all such funds.[61] The Commission ordered the government to calculate the amounts due on the principal accounts at a 5% interest rate. A. 32-3, 35-6, 49. The government has paid interest at the 5% rate on the trust land proceeds of other Indian tribes.[62] The Commission thus

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[59] Testimony of Mr. Charles W. J. Lenard, the supervising examiner, Office of Administrative Services, General Accounting Office, charged with preparing the 1953 GAO report in this case. Tr. 101-2, 107-118, October 8, 1963, Indian Claims Commission.

[60] The Commission found that between July 26, 1899, and June 30, 1928, a total of $215,977.58 had been collected from Southern Ute land sales and that no interest had been paid on those proceeds until January 31, 1930, when the government began to credit interest at a rate of 4% per year on then existing balances. A. 31-32. See 1953 GAO report, A. 136-9.

[61] Indian Trust Funds Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. 161; Five Per Cent Interest Act, R.S. § 3659 (Act of September 11, 1841, 5 Stat. 549).

[62] The Commission so found (A. 33). See the testimony, from personal knowledge, of Mr. Lenard, the GAO supervisor in charge, in this case. Tr. 119-24, 146-7, October 8, 9, 1963, Indian Claims Commission.

ordered the government to furnish the accounting so that the Indians might check the results and compute the loss occasioned.[63]

d. *The government unlawfully transferred the Tribe's trust funds to the credit of other Indians. Exceptions 4, 5. A. 19.* In at least three instances, and by its own admission, the government wrongfully transferred money belonging to respondent to the credit of other Ute Indian tribes. A. 35, 49. Not only was the transfer unlawful, but the respondent lost the money and the interest on it. Surely, this is subject to correction through a proper accounting.

e. *The government spent the Tribe's trust funds for unauthorized purposes. Exception 6. A. 19-20.* Rather than spending the Southern Ute's trust money for the benefit of the Tribe, the government spent the money for itself. It spent the money for such governmental functions as routine agency expenses, the maintenance of law and order, construction of roads and bridges, agricultural aid and demonstration projects, and the pay of agency employees—expenditures which the government would otherwise pay from its own funds. These classes of allegedly wrongful expenditures were detailed by both the respondent and the Commission. A. 19, 34. Since the government has not replied to this exception by showing the legality of the expenditures challenged, the Commission merely ordered the government to sustain their legality without any presumption of wrongfulness. A. 49-50.

f. *The government failed to conserve the Tribe's interest-bearing funds. Exception 7. A. 20.* The government is obliged to reconstruct accounts, and to repay the

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[63] In addition to the actual payment in other cases the Commission's action was based on *Sioux Tribe* v. *United States*, 105 C. Cls. 725, 801-2; *Wootton Land & Fuel Co.* v. *Ownbey*, 265 Fed. 91, 99-100 (C.A. 8, 1920).

losses if any, when it spends interest-bearing funds before noninterest-bearing money or where it spends higher rate interest-bearing funds before it spends funds earning a lower rate of interest. Otherwise, the government would be enriching itself at the expense of its Indian ward. An indication of the government's failure in these matters is found in the GAO report which, among other things, shows that as of June 30, 1951, there was far more money in the "Interest on Proceeds" account, which is noninterest bearing, than there was in the "Proceeds" account, which is interest-bearing, although both accounts were indeed small by that date. A. 138-9. The Commission ordered the government to restate the account with appropriate information in the supplemental accounting. A. 50-1.

Because of petitioner's dearth of argument on these primary exceptions to the GAO report, we are led to assume that the petitioner may be in agreement with us that the accounting ordered by the Commission, and affirmed by the Court of Claims, on these itemizations is proper. Br. 29-30. If our assumption is correct, then only one item is really at stake in the government's attack on the accounting exceptions.

All of the exceptions, save possibly this one, were specifically directed at the land sales proceeds and the Commission's opinion in this case called only for "a further and complete accounting from defendant [United States] with regard to those items questioned by petitioner [Southern Ute Tribe] in its exceptions." A. 46-47.

g. *The government failed to include all land proceeds. Exception 8. A. 22.* The single exception which the petitioner cites to this Court as going beyond the original petition filed with the Indian Claims Commission called for the payment of 5% interest on tribal funds in an account styled "Indian Moneys, Proceeds of Labor, Southern Ute Indians" (IMPL). Deposits to this account began in 1892 and to the extent that any interest was

paid, it was paid at 4% under a 1930 statute beginning in 1931. A. 33-4, 143-7. Respondent's exception on this item was *rejected* by the Commission. A. 51-2. The court below affirmed. A. 97.

Even though the government has never previously pointed to a specific example where it thought our exceptions were not covered by the petition before the Indian Claims Commission, it is difficult to see how its citation of the rejected exception for interest on a complicated tribal trust fund is an example of "funds unrelated" to the accounting claim. Br. 31. The government recognizes that this fund has in it some tribal trust funds subject to this accounting, but it urges that the issue be by-passed. Br. 31, fn. 7. That suggestion is possibly correct. But from our point of view, it seems plain that the Tribe's IMPL money was embraced within the original petition before the Indian Claims Commission.

Through the years, tribal IMPL funds have received rather shabby treatment at the hands of the Department of the Interior, and a word of history concerning the fund "Indian Moneys, Proceeds of Labor" may help. To start with, the Act of March 3, 1883, 22 Stat. 582, 590, provided that "The *proceeds* of all pasturage and sales of timber, coal, or other product of any Indian reservation . . . and *not* the result of the labor of any member of such tribe" were to be deposited in the Treasury for the benefit of that tribe. Within a few years, Congress enlarged the discretionary powers of the Secretary of the Interior over the use of IMPL funds,[64] and today, the IMPL account represents a variety of "miscellaneous revenues" of Indian reservations which are rarely, if ever, the proceeds of Indian labor.[65]

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[64] Act of March 2, 1887, 24 Stat. 449, 463.

[65] The basic statutes and amendments establishing the IMPL account are codified at 25 U.S.C. 155.

These funds, or a portion of them, represent the proceeds collected by the United States from the disposition of interests in an Indian tribe's natural resources and other property. In the case of the Southern Utes, those proceeds were rentals and royalties from mineral and grazing leases, payments for railroad and other rights-of-way across tribal lands, sales of agricultural products, timber, water, and livestock, penalties for trespasses on tribal lands (usually grazing), and the sale of miscellaneous property which may or may not have belonged to the Tribe. A. 145-6. Of the net of $19,124.22 assertedly collected, in excess of $15,000 was derived from these categories of disposals of interests in Southern Ute reservation lands.[66] There is nothing to indicate at this stage that this money was from a land base other than the one called to account in the original petition before the Indian Claims Commission.

We would observe that the 1951 petition filed with the Indian Claims Commission pleaded for an accounting of proceeds collected by the United States from some identifiable disposals of Southern Ute reservation lands —disposals which sounded in the main as conveyances of fee simple titles to third persons and the money paid by such persons for those lands. The GAO report in this case purports to contain an accounting of proceeds during the period February 20, 1895, to June 30, 1951, together with interest from February 12, 1929. A. 132. The GAO report went on to state that accountings cover-

[66] The sources listed make up the bulk of the IMPL funds involved in this case, although some small amounts were also collected from the sale of property and services other than interests in tribal lands (A. 146-7, 33-4). Of the total $19,124.22 collected between May 13, 1892, and June 29, 1940, all but $3,461.80 was derived from such interests. A. 145-6. By statutory definition, these are trust funds. Permanent Appropriations Repeal Act, 1934, 48 Stat. 1233, 31 U.S.C. 725s(20). Interest on this account, amounting to $219.47 was paid for the period January 9, 1931, to January 31, 1935. A. 33-4, 51-2, 146; Southern Ute Exhibit 25, pp. 504, 659, in the original papers.

ing the period February 20, 1895, to December 31, 1946, were also included in GAO reports dated June 24, 1949, and March 12, 1951, in Court of Claims Nos. 46640 and 47567, *Confederated Bands of Ute Indians* v. *United States*. A. 132. See discussion, *supra*, pp. 13-17.

Examination of the 1951 GAO report in Case No. 47567 developed that money had also been collected by the United States for the disposal of interests in the Southern Ute reservation lands amounting to less than the fee simple titles and that this money was posted on a set of ledgers maintained by the Department of the Treasury separate from the money collected and carried as proceeds under the 1895 Act. If the 1953 GAO report for this case had shown directly rather than by reference the total proceeds from all interests in Southern Ute reservation lands instead of the receipts from the fee simple title disposals only, that report would also have contained the information regarding IMPL funds and much of the controversy might have been avoided or decreased.[67]

The fact that through ancillary investigation, the Tribe's counsel became aware that money had been collected from disposals of interests in Southern Ute lands but reported by reference and not directly in the GAO report in this case ought not be turned against the Tribe at this late date on the government's contention that a "new" claim "unrelated" to the proceeds of land accounting has run afoul of the statutory limitation in Section 12 of the Indian Claims Commission Act. 25 U.S.C. 70k. We are led only to wonder at this juncture in what other ledgers at the Treasury are posted funds

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[67] Pertinent portions of the GAO reports in Court of Claims No. 47567, *Confederated Bands of Ute Indians* v. *United States*, were introduced in evidence in this case as the Tribe's Exhibit 25 and Case No. 46640 as Defendant's Exhibit 21, under Rule 31 of the Commission providing for admission in its cases of evidence in other cases. 25 CFR 503.31.

from the Tribe's lands which were not disclosed in any GAO report.

The petitioner chides us for including the IMPL money at all as a chance discovery without suggesting that it relates to the proceeds of land accounting. Br. 31. We do not know what more could have been done after we became aware that the $19,124.22 IMPL credit had been earlier set up in another set of books, although those books were referred to in the GAO report for this case. A. 132. This case was then set for trial on liability and we had filed our primary exceptions to the GAO report. Briefing had not commenced. Upon analysis, the IMPL funds appeared to be principally proceeds from the disposals of interests in Southern Ute tribal lands starting in 1892 and interest on the money was not credited until 1931—and then under the same statutory authority that the government used to credit interest to the proceeds of land fund covered by the GAO report in this case.[68] In both GAO reports the government's treatment of the two accounts was identical—only the titles of the ledgers were different. What the petitioner means by telling the Court that an IMPL account cannot "ordinarily" be expected to have land disposal moneys in it indicates only that—like the book and its cover—the titles of the ledgers are not indicative of the source of the funds or their use. And this is precisely why a true, complete and proper accounting is necessary.

While our exception seeking payment of 5% interest on tribal IMPL funds from the beginning was rejected by the Commission (A. 51-2), respondent's exception going to the expenditure of such funds for purposes other

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[68] The authority of the United States to collect the two funds was the 1895 Act (Proceeds of Sale) and the 1883 Act (IMPL), and the authority for the payment of interest cited in both instances is the Act of June 13, 1930, 46 Stat. 584 (25 U.S.C. 161a, 161b). A. 137-139; 45-8.

than the benefit of the Tribe is outstanding. A. 22, 52-3. An additional word of history will show why this exception is eminently proper.

Through the years after the 1883 Act (22 Stat. at 590) when the discretionary power of the Secretary of the Interior was enlarged (*supra*, pp. 59-60), "A practice developed" at the Department of the Interior to deposit the miscellaneous revenues of the entire reservation to the IMPL account, which the Superintendent of the reservation then disbursed. Complaints from the Indians on the spending of these moneys became so intense that an investigation was made by the General Accounting Office. In a report on Indian funds dated February 28, 1929, the Comptroller General stated that the Indian agents exercised "absolute control and almost indiscriminate use of these funds," and a sample of the kinds of uses proved the Indians had a valid complaint.[69] IMPL funds "were being used for such purposes as the purchase of . . . furniture, rugs, draperies, etc., for employees' quarters, papering and painting the superintendant's house, and the purchase of automobiles . . . ." All this led the Comptroller General to conclude that the practice of handling IMPL funds by the Department of the Interior "brought about a very broad interpretation of what constitutes 'the benefit' of the Indian."[70]

Despite the protestations of the government, we have *never* sought a general accounting for *all* funds of the Southern Ute Tribe in this case. We have *never* attempted to transmute this claim into such a general accounting as was implied in the petition for a writ of certiorari in this case (Pet. 10), or sought "a broader,

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[69] The Comptroller General's report to Congress is found in S. Doc. No. 263, 70th Cong., 2d Sess. (1928-9), pp. 39-40. The IMPL account problem is described in *Federal Indian Law* (GPO), pp. 66-7, and in *Handbook of Federal Indian Law*, pp. 106-107, by Felix S. Cohen, referred to by this Court as an "acknowledged expert in Indian law," in *Squire* v. *Capoeman*, 351 U.S. 1, 8-9.

[70] S. Doc. No. 263, 70th Cong., 2d Sess., p. 39.

general accounting" as suggested by the petitioner. Br. 35. We did and do seek "a true, proper and complete accounting" of the funds questioned in the 1951 petition filed with the Indian Claims Commission and amplified by the 1963 exceptions to the GAO report.

2. *Respondent's exceptions to the GAO report are pleadings which relate to specific issues in this case.* What appears to confuse the petitioner is the procedure of the Indian Claims Commission in disposing of the merits of this accounting claim. The Commission is essentially an administrative tribunal, sitting as both hearing examiners and decision makers,[71] but its rules of procedure are skeletonized adaptations from the Federal Rules of Civil Procedure and the rules of the Court of Claims. Pleadings shall be construed "to do substantial justice" and leave to amend "shall be freely given when justice so requires." Rules 7(c), 13(a), 25 CFR 503.7(c), 503.13(a). The Commission's Rule 13(c) on relation back is *verbatim* from Rule 15(c), F. R. Civ. P., where the claim asserted by amendment "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth" in the original pleading. And its reception ought to be given the same liberal treatment. See *Tiller* v. *Atlantic Coast Line*, 323 U.S. 574, 580-1. This liberality would allow amendments unless there is so great a change in the material operative facts that an entirely different fact situation is presented. In the case here presented, the facts are all the same—only the figures are different. What should be kept in mind is that it is the course of the government's conduct in collecting and disbursing trust proceeds from limited sources that is being called to account. The amplification of the original complaint by exceptions, pointing out in what manner that conduct was a breach of the government's fiduciary duty, as shown by its own GAO reports, certainly does not make

[71] See, *e.g.*, H. Rept. No. 2693, 79th Cong., 2d Sess., p. 8, the Conference Report on H.R. 4497, which became the Indian Claims Commission Act.

for new or different claims. Hence, the applicability of the rule of relation back of the exceptions applies in this case.[72]

A few months before this case was being heard on liability, the Commission decided on a somewhat standardized procedure for its accounting cases. *Sioux Tribe* v. *United States*, 12 Ind. Cl. Com. 541, 547-8 (1963).[73] In its earlier years, one controversy in accounting cases at the Commission centered over which party had the burden of proof: on the one hand the petitioning Indians contended that the government had the duty of proving that expenditures and other transactions involving their funds were proper, that the funds were lawfully used for the Indians' benefit, that the GAO reports as such were not responsive pleadings to an accounting claim, and the government was obligated to answer the original petition formally; on the other hand, the government consistently took the view that a GAO report is all of a response to an accounting claim that is needed and it is the Indian petitioner who must then go forward and point out where the United States failed in its duty in handling properly the moneys involved. *Sioux Tribe* v. *United States*, 12 Ind. Cl. Com. 545-6.

Faced with this impasse, the Commission peremptorily determined the proper procedure to be followed "henceforth wherever applicable." *Sioux Tribe* v. *United States*, *supra*, p. 545. The Commission stated:

> "[546] . . . The filing of the General Accounting Office reports is a proper response to the petitions.

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[72] Whether denominated as amendments to the original petition or not, and they were so treated by the court below (A. 95-6).

[73] After the 1963 hearing of this case, the government, in its requested findings of fact and brief, evidently considered this standardization as not applicable to the case at bar, Def. Requested Fdgs. of Fact, etc., p. 47, and felt that the *Sioux* case, *supra*, was good for that date and train only. But during the trial, the Commissioners of the Indian Claims Commission at least thought the same procedure as in the *Sioux* case was being followed (Tr. 88-89, October 8, 1963).

The reports set forth all receipts and disbursements on behalf of the various tribes . . . ."

"[547] It is the opinion of this Commission that the desirable procedure to be followed in these accounting cases consists of the filing of the General Accounting Office report by defendant in pursuance of the petition along with such appropriate motion as defendant may see fit under the circumstances. Petitioner will then file in writing within ninety (90) days its specific exceptions, if any, along with its reasons therefor, to any item or items which it contends are in violation of a proper accounting and which should be disallowed. Defendant will file an answer within the usual time. The parties will then be at issue and may proceed to a hearing on the matter. This is the procedure apparently favored by the Commission in prior cases where the problem has arisen although it has never been set forth in its entirety. It appears also to be the procedure followed by the Court of Claims. See *The Sioux Tribe, et al.* v. *The United States*, 97 C.Cls. 391, 397."

The effect of the Commission's ruling was that upon receiving a General Accounting Office report, the Indian petitioners were charged with the burden of going forward by apprising the government of the specific items as shown in the report which aggrieved them. No presumption of improper conduct would run against the government and its actions would not be questioned further unless the petitioning Indians specifically itemized their objections. *Sioux Tribe* v. *United States*, *supra*, pp. 549-50. Thus the "exceptions" in this and all other accounting cases before the Indian Claims Commission constitute efforts to join issues.

The government now complains quite vigorously that respondent's "exceptions" to specific items in the GAO report are nonetheless new accounting demands barred forever by Section 12 of the Indian Claim Commission

Act providing that the Commission "shall receive claims" for five years after August 13, 1946, and "no claim existing before such date but not presented" within those five years may thereafter be submitted for consideration by any court or administrative agency or entertained by Congress. 25 U.S.C. 70k. As we have previously shown, these exceptions are not new or different claims. *Supra*, pp. 55-64.

Additionally, there are practical reasons why the Commission should be entitled to determine its jurisdiction in matters such as this and proceed with the total of the claims before it. There is no way that an accounting claim, whether general or specific, can be cut off precisely on August 13, 1946. The GAO does not keep records on that basis and the nearest fiscal year termination which could be utilized would be June 30, 1946, prior to the running of the statute, or June 30, 1947, after the running. Even December 31, 1946 would, under petitioner's view, fall to the time bar defect.

As a matter of the Commission's business, accounting petitions were generally the last claims to have been taken up for consideration. Consequently, it was several years before accounting claims really reached the Commission for consideration. Whatever guidance might have been given by the Commission in considering its own jurisdiction under accounting claims was thus delayed beyond the time when Indian claimants could protect themselves by new suits in the Court of Claims as the government suggests to this Court as the proper method of disposing of the problem. Br. 40-1.

Today, almost twenty-five years after enactment of the Indian Claims Commission Act, some Indian claimants are faced with the anomalous position of having their asserted claims sliced off as of 1946 or 1951 with the resulting loss of a claim and the potential of an award until such time, possibly, as a second suit may

be brought in the Court of Claims covering a different time period.[74]

If we understand the government correctly, it admits that this accounting claim, whether general or specific, accrued and was existing before August 13, 1946—thus running up against the limitations of both Sections 2 and 12 of the Indian Claims Commission Act. 25 U.S.C. 70a, 70k. If the government's conduct in accounting for respondent's funds after August 13, 1946, is about the same as it was before that date, this claim marches on from its first accrual. This is in the nature of a running account in that there are mutually open current dealings subject to a final balance in the future. *Cf.*, *Baggett Transportation Company* v. *United States*, 162 C.Cls. 570, 580; *Woodward* v. *Armstrong*, 73 F.2d 513 (C.A. D.C.). Rather than settle the account once and for all, as was the purpose of the Indian Claims Commission Act,[75] the petitioner would delay the final day of reckoning by chopping off as of August 13, 1946, proceedings in the Indian Claims Commission and thereafter sending the claimants to the Court of Claims for the balance of the account which, from all appearances, arises out of the same conduct from which the original cause arose. In any other proceeding this kind of suggestion would raise the specter of improper splitting of the claim.

While not stated directly, what the petitioner seems to tell the Court is that the Indian Claims Commission

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[74] See Br. 41. GAO reports prepared on accounting cases before the Commission, whether general or specific, have been certified as completed on very irregular dates. A review by counsel of representative accounting cases indicates the following: San Carlos Apache Tribe, Docket No. 22H, covering the period March 3, 1883, through June 30, 1951, was certified completed November 6, 1970; Mescalero Apache, Docket No. 22G, certified June 18, 1969; Fort Peck Tribes, Docket No. 184, certified January 16, 1960; and Northern Paiute, Docket No. 87A, certified April 25, 1963.

[75] *Klamath & Modoc Tribes* v. *United States*, 174 C.Cls. 483, 487; *Creek Nation* v. *United States*, 168 C.Cls. 483, 493.

has no *power* to act on anything which involves events after August 13, 1946. Of course, this completely ignores what the petitioner as a defendant before the Indian Claims Commission has been doing for the past twenty years. The Commission's rules, to the extent they cover anything involving a jurisdictional interpretation of the 1946 Indian Claims Commission Act, are weighted in favor of the government. When it comes to set-offs and counterclaims, for example, those rules explicitly afford the government the right to set up any such claim as it may have where omitted through "oversight, inadvertence, or excusable neglect, or when justice requires" without relation to time. Rule 12(b), 25 CFR 503.12(b). For the government the awesome bar of August 13, 1946, is seemingly raised for the purpose of aiding the United States which, by the same reasoning as applied to the respondent in this case (if this Court should think such reasoning should apply), ought to be prohibited from seeking to recover counterclaims and set-offs after August 13, 1946. We feel certain that such a rule would not be acceptable to the government.

The reasoning of the court below was not "fallacious," as petitioner states, when the court opined that the government's failure to contest the substance of the accounting exceptions pointed directly to misconduct in its fiduciary capacity. A. 96; Br. 36, fn. 12. It is true that the government has continuously defended on jurisdictional grounds, has repeatedly stated that the exceptions were new general claims and also claimed that the original petition did not cover general or trust claims.[76] Since the funds here in question are by statute held in trust (*supra*, p. 52) and none of the exceptions requests an accounting of all Southern Ute funds, we are at a loss to grasp the significance of the petitioner's argument. The fact that it takes two other GAO reports to explain

[76] Tr. 91, October 8-9, 1963, Indian Claims Commission; Def. Br., Proposed Findings of Fact, etc., 1964, pp. 45-8.

omissions in the 1953 report for this case is some indication the court below was certainly not without justification in its observation (*supra*, pp. 60-2).

In order to compute what should have been done with the respondent's trust funds in the first place, and, if much of the work has not already been done (*supra*, pp. 60-1), in *determining* the obligations of conserving and making respondent's trust funds productive, the government will have to take into *consideration* the tribal moneys held in other interest and noninterest-bearing accounts apart from those here in question, even though the potential judgment would run only on the funds in this account. This consideration is necessary because of the government's persistent failure to account properly and completely in the first place, a failure which permeates the whole history of the Southern Ute accounts from at least 1895.

Disregarding its own recognition of the judgment factor in whether a claim is new and different, petitioner characterizes only as "novelty" the issue raised by the exceptions. Br. 37. We do not know what is new, different or novel in pointing out instances where the government failed to pay interest on money for Indian trust lands where an Act of Congress so required or in questioning specific classes of expenditures of those trust funds—all involving possible breaches of the fiduciary duty to conserve and make productive the trust funds in its custody. The *single* item petitioner cites as beyond the pleaded claim is an exception to pay interest on the "Proceeds of Labor" fund at 5% from 1892 rather than 4% from 1930. Br. 31, 38. We have shown these IMPL funds, although called miscellaneous revenues, are mainly proceeds from disposals or uses of interests in tribal lands through the leasing of different natural resources. *Supra*, p. 60. And, importantly it would seem, this specific exception on interest cited by the petitioner to prove its point was the one rejected by the Commission. A. 51-2.

If the case is handled by the Commission, with appropriate examination as to the items called to question by respondent's exceptions, the Congressional mandate will be fulfilled rather than suspended by the rule suggested by the petitioner. Br. 38. Otherwise, it is likely that the Court of Claims will inherit a group of accounting problems stemming from the government's conduct antedating August 13, 1946, all to be continued anew in that court—with only the time period changed—or the Indians will be denied their day in any court. These claims did not accrue after 1946 but are the continuing result of a chain of events started long before that date.

Whatever may be said about the "reasonable enforcement" of the limitations in the Indian Claims Commission Act, it is clear that the petitioner's argument fosters litigation rather than promotes the prompt settlement of the claims of the Indians. The Congressional impatience emphasized by the government would be perpetuated by a fresh filing in the Court of Claims of the same accounting cases pending in the Commission.

The government resorts to citations to the lengthy legislative effort leading to enactment of the Indian Claims Commission Act to establish what is not disputed —that Section 12 says the Commission was not to receive claims filed more than five years after August 13, 1946. Br. 33, fn. 8. Unfortunately for petitioner, that does not dispose of the matter. More important than the dozen or so bill references to antecedents of 25 U.S.C. 70k, is the purpose of the Act itself and the Congressional acknowledgement that for the first time since 1863,[11] all Indian tribes would be able to present their

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[11] By virtue of the Act of March 3, 1863, 12 Stat. 765-767, all claims of Indian tribes against the United States growing out of treaty obligations were barred from the Court of Claims, and only a special act of Congress permitting tribal suits avoided that jurisdictional bar. Indian tribes thus were denied a right com-

claims for redress to a tribunal. In presenting H. R. 4497, which became the Indian Claims Commission Act, to the 79th Congress, Congressman Jackson, manager of the bill, stated as follows: [78]

> "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability. . . .
>
> "Let us pay up our debts. Let us pay our debts to the Indian tribes that sold us the land that we live on. They sold it for little enough, generally a few cents an acre.[79] Let us at least pay what we promised to pay, if we have not already done so, and let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed. And let us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape, and variety, so that this problem can truly be solved once and for all without coming back to haunt us or our successors in the form of further bills to extend the jurisdiction that this bill would confer on an Indian Claims Commission."

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monly recognized for every American citizen. *Legislative Materials*, p. 606; 92 Cong. Rec. 5318, May 20, 1946.

We adopt the same lead as used by the petitioner in its brief, footnote 8, page 33, referring to *Legislative Material*. We would add that Mr. Robert W. Barker, associated with Mr. Ernest L. Wilkinson at that time, is now a partner in Wilkinson, Cragun and Barker, the law firm which holds the attorney's contract with the Southern Ute Tribe, respondent before this Court.

[78] 92 Cong. Rec. 5312-3; *Legislative Materials*, p. 600. See *Klamath & Modoc Tribes* v. *United States*, 174 C.Cls. 483, 488-9.

[79] The Southern Utes have yet to receive anything for their property disposed of pursuant to the Act of 1895.

B. *The Right to Enter an Up-To-Date Judgment is an Intergral Part of the Indian Claims Commission's Jurisdiction*

Three interlocking grants and limitations of jurisdiction involving the Indian Claims Commission and the Court of Claims are presented in the petitioner's attack on the Commission's order for an up-to-date accounting. The first expressly removes from the Commission's consideration claims "accruing after August 13, 1946." 25 U.S.C. 70a. The second denies to the Commission, or any court or other administrative agency, the future consideration of any "claim existing" before August 13, 1946, but not presented to the Commission within the five-year filing period after that date. 25 U.S.C. 70k. And the third confers jurisdiction on the Court of Claims over any Indian tribal claim against the United States "accruing after August 13, 1946," in the same manner as any other litigant before that tribunal. 25 U.S.C. 1505. By merging or confusing the three, the government obliquely tells this Court that the Commission has no *power* over any governmental action after August 13, 1946. Br. 40-1.[80]

Petitioner's assertion that the Commission is barred by time and Indian claimants can go or could have gone to the Court of Claims with their post-August 13, 1946 accounting claims, ignores the very practical point that from at least 1956, the Commission, the Indian claimants, and evidently the government prior to this case, acceded to the decision of the Court of Claims in *Gila River Pima-Maricopa Indians* v. *United States*, 135 C.Cls. 180, 186; *Gila River Pima-Maricopa Indians* v. *United States*, 157 C.Cls. 941, hold-

[80] The government complains that the decision below exposes *new* instances of wrongdoing possibly allowing an additional measure of relief. But it also acknowledges that respondent is entitled to damages for any wrong accruing before 1946. Br. 40-1. The wrongs complained of herein accrued long before 1946 and they will continue until adjusted. They are not "new" claims which arose after 1946.

ing that the Commission's jurisdiction in an accounting extended all the way to the entry of final judgment and was not cut off on August 13, 1946. 135 C.Cls. 186. It seems late in the day for the government to challenge a construction of 25 U.S.C. 70a relied on for 15 years by the court which provides appellate review of the Commission's decisions and which categorized the rule as a good one.

In its 1956 opinion in *Gila River*, 135 C.Cls. 180, the Court of Claims construed 25 U.S.C. 70a to mean that the Commission was free to consider a claim arising prior to 1946 "where it is a continuing one." 135 C.Cls. at 185. It was clear that its jurisdiction was limited to claims accruing after 1946. It used as an example, a case where rent under a lease is payable before and after 1946. It followed the usual rule—"a court once having obtained jurisdiction . . . retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." 135 C.Cls. 186. The court below and the Commission followed that reasoning in this case. A. 97.

What the court below did was to apply the elementary principle that once jurisdiction attaches, the court is entitled to see the matter to completion. *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283, 291-2. Jurisdiction attached when the petition was filed on August 13, 1951, and the Commission's power extended to ordering an up-to-date accounting involving the 1953 GAO report and the items questioned by the respondent's exceptions.

The question of an up-to-date accounting (*i.e.*, a GAO report beyond June 30, 1951 in this case) was to the Commission one of first impression, even though it had the guidance of prior decisions of the Court of Claims and analogous matters from its own docket. A. 53. Turning to its own precedent on the matter of recoupment of gratuitous expenditures made by the government out of awards to Indian claimants under 25 U.S.C. 70a,

the Commission held that, if the government was entitled to deduct offsets beyond the cut-off date for filing claims as it had earlier held, *Kiowa, Comanche and Apache Tribes* v. *United States*, 5 Ind. Cl. Com. 72, 109-111, then the Indian claimants ought to be able to obtain an accounting beyond the same cut-off date. A. 53-55. For its ruling on the allowance of gratuities up to date, the Commission relied on *Sioux Tribe* v. *United States*, 105 C.Cls. 725, 811-12, where the Court of Claims permitted the government to recoup its gratuitous expenditures after the closing date of the jurisdictional act permitting the suit. A. 53-4. The Commission reasoned in this case that the parties should be treated equally. The Indians would get their up-to-date accounting and the government would be allowed offsets to the same date. A. 55.

One amazing fact in this case is the government's story that for more than 20 years the Department of Justice has erred in its defense of cases under the Indian Claims Commission Act; that public moneys were paid out on its recommendation involving litigation and settlements openly and fairly arrived at,[81] but that since these payments involved times and transactions after August 13, 1946, the adjustment of the Indian grievances and claims was, "to a slight extent, without juridical force." Br. 41. This confession, if truly representing the position of the United States, is dropped at the Court's door as the progeny of confusion. But

[81] At one point, the Department of Justice, through its Assistant Attorney Generals, was somewhat encouraged that the prospect of settling cases would hasten the disposition of Indian claims, thus responding to the Congressional impatience which is so dear to its present policy. See, *e.g.*, Indian Claims Commission Act Amendments, Hearing before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, on S. 307, 90th Cong., 1st Sess., February 15, 1967, pp. 63, 71, 73-4, 75; H. Rept. 132, 90th Cong., 1st Sess., Amending the Indian Claims Commission Act, p. 9, letter dated March 1, 1967, of the Acting Attorney General.

the government promises, not quite consistently, that it will not go back on those closed transactions and will in the future continue to honor such illegality. We assume this is not an attempt to reopen the door on settled cases (Br. 29, fn. 6), and find solace in the knowledge it would not succeed. Congress acted upon those judgments and appropriated money to pay them.

The government attacks the respondent's case as a dramatic "new accounting enterprise." Br. 41. We have several times demonstrated what is at stake accounting-wise—none of which is new, novel, or general. *Supra*, pp. 55-64. This entire jurisdictional discussion of petitioner is premised wholly on the erroneous assumptions that (a) everything about the respondent's exceptions created new claims, and (b) anything about an Indian claim which occurs after August 13, 1946, falls within the statutory bar to the Commission's power. Petitioner is wrong again—on both assumptions.

An Indian accounting claim, whether general or specific, involves a somewhat unique situation in that all of the information is available to the government and hidden from view of the Indian tribe, even though a fiduciary relationship toward its ward-like Indians is involved. The government collects their money; keeps their books; harbors their funds; and spends their money. If we agree with the observation of the petitioner, and perhaps the court below, that the Commission's rationale was novel, its result was an extremely practical construction of 25 U.S.C. 70a, and enabled it to rule wisely on the effect of the government's actions before it. The Commission's decision in this case sought to achieve the finality of purpose with which the Commission is charged in the first place. Its decision, encouraged by the Court of Claims in earlier cases and the parties before it through the years—one of which was always the petitioner—went farther to prevent the delay and obstruc-

tionism denounced by petitioner than it did to promote the refiling of accounting cases in the Court of Claims and thus extend and delay the conclusion of the Indian claims problem.

It is simple for the government to stand righteously on statutory bars backed by unquestioned case precedent cited in train. Br. 32-3. But in the decisional pit, the practical effect of the construction of a particular jurisdictional question, where the tribunal's power is not clearly barred, should be highly regarded. Considerations such as this led the Court of Claims to place first interpretation on the Commission to define its jurisdiction under 25 U.S.C. 70a. Petitioner's pronouncement that the Court of Claims is the appropriate forum in all claims matters post-1946 creates a host of procedural and substantive problems in adjudicating and trying a later case on the same accounting prior to the disposition of the primary claim by the Commission. Since the Court of Claims acts as the appellate tribunal over the Commission's decisions, the door is opened to conclude the subsequent and possibly less important matter on trial in the appellate court before the claim at the Commission, which also might be able to settle all such claims. Such a judicial merry-go-round is totally unacceptable, not only to the respondent here, but we suspect to the Commission, the Court of Claims, and the government on reflection.

Petitioner's ultimate point is the effect on post-1951 GAO reports for the forty-four general accounting claims allegedly pending before the Commission. Br. 41-2. Some of those Indian claimants have already raised the up-to-date issue in their claims, and others no doubt wait on the decision of this Court on the point since we understand that the petitioner has asked the Commission to halt all action on such pending accounting cases until the decision here comes down. Whether there are forty-four, which we doubt, or four, the point is important. Resolution of it should be handled as remedial legisla-

tion is handled. The Indian Claims Commission Act should be construed today as it was understood when passed. All claims of every kind, shape and variety were to be heard by the Commission and nothing was to come back to haunt Congress in the form of requests for action to extend the jurisdiction conferred on the Indian Claims Commission. *Supra*, pp. 71-2. Petitioner's theory of jurisdiction casts the brooding shadow of just such an event.

CONCLUSION

The decision of the court below, affirming the interlocutory order of the Indian Claims Commission, should be affirmed.

Respectfully submitted

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February 10, 1971

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416-923—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

I. THE RES JUDICATA ISSUES

The government's contentions regarding the application of *res judicata* are, first, that the lands in question fall within the description of land "formerly owned or claimed by [the Confederated Bands of Utes] in western Colorado, ceded to the defendant by the Act of June 15, 1880," as to which respondent, by its present attorney, settled all claims in return for a 40 percent share of the 1950 settlement judgment; and, second, that since they do fall within that description, it was improper to entertain parole evidence to show a different meaning. Respondent appears not to

dispute the latter contention, and argues solely that the lands in question here were not ceded by the 1880 Act.

At the outset, it may be doubted whether this is an appropriate case for applying rules of construction so rigorously in favor of Indian interests as respondent asserts. Certainly it is not the government's view that it is "avoid[ing] any payment whatsoever" for the Southern Ute lands (Resp. Br. 20). Those lands were part of the reservation ceded as a whole by the Confederated Bands in 1880; they were the only part of the Ute Reservation inhabited by the Southern Utes, who received a 40 percent share of the settlement judgment made in 1950.[1] Moreover, the issue of construction in this case arises in the context, not of a treaty entered with an Indian tribe to which the United States has duties as trustee and guardian, but of a settlement agreement negotiated with attorneys of the

[1] As respondent is aware, the Confederated Bands of Ute Indians received moneys relating specifically to lands in the area here claimed by the Southern Ute Tribe or Band ("Royce Area 617") in the 1950 settlement as well as in the 1910 litigation, *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. The judgment on the accounting claims in 1910, No. 30360, included $172,553.55 in proceeds of sales from this area and $61,992.50 in payment for lands taken for the San Juan National Forest; the settlement reached in 1950, No. 46640, included $43,436.40 in additional receipts specifically tied to sales of lands in this area, for a total of $215,989.95. Over the same period of time there was an additional, duplicate accounting and payment to the Southern Ute Tribe or Band under Section 5 of the Act of 1895, in the total amount of $215,977.58. Resp.'s Memo. in Support of Motion to Vacate Order of Remand in the Court of Claims, p. 5 n. 2; see, also, Govt. Br. (Ct. Cl.) 33; Govt. Reply Br. (Ct. Cl.) 10–11. These matters were sloughed off below as having been outside the jurisdiction of the deciding courts (App. 42, 86).

highest professional standards of industry, skill, tenacity and fidelity. *Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609, *passim*. In fixing the meaning of that settlement agreement, it is inappropriate to hold the United States to any greater standard of precision or care than the attorneys for the other side.

Respondent does not deny that the lands which are the basis of this suit were part of the Ute Reservation ceded to the United States by the Confederated Bands in 1880. Rather, it contends either that the southern strip of the reservation was reserved by the Act as tribal lands, or that the Act was merely executory and effected no cession whatever pending subsequent enactments in 1882 and 1895. Neither contention bears examination.

1. As we show in detail in our main brief, the 1880 Act reserved no tribal lands; rather, it provided for a procedure by which allotments in severalty could be made to individual Indians in specified, limited areas of the prior reservation, and the remainder would then be opened for public sale. The area reserved for the Southern Utes was "the unoccupied agricultural lands on the La Plata River," in Colorado, and, if that did not suffice, also on the same river in New Mexico. 21 Stat. 200. As inspection of any atlas will show, the La Plata is a small stream, which runs southward through the 15-mile width of the 100-mile-long strip respondent claims this language reserved. It is hard to imagine that by referring to agricultural lands in the valley of this single stream,

to be conferred on individual Indians in severalty, Congress and the tribe reserved to tribal ownership lands extending more than 60 miles east of the stream, across the valleys of larger rivers, the Animas, the Los Pinos, and the San Juan. Respondent's whole case depends on the assertion that the reference to the La Plata had that effect.

That it did not is shown by the sources on which respondent itself relies. Although the ratification agreement signed by the Southern Utes in 1880 has no independent effect,[2] it states that the Southern Utes did "cede, sell and convey" their reservation lands except for those on and near the La Plata. Resp. Br. 22. The lands the Southern Utes occupied were coextensive with the 15-by-100-mile strip respondent claims this language reserved; if those lands did constitute, as respondent claims, a separate reservation maintained as such by the Act, then the Southern Utes would have sold nothing at all. Of course, the Act embodied no such legerdemain; it involved the sale and cession of the Ute Reservation as a whole, with reservation of land only to the extent that might be required for allotment to individual Indians in severalty.

As Commissioner Manypenny recognized in the report on which respondent relies, Resp. Br. 23 and n. 33, creation of a reservation on the former Southern Ute lands would have required the government "*to so modify* the [1880] agreement" as to restore

[2] The treaty reflected in the 1880 Act was with the whole of the Confederated Bands and required ratification by three quarters of all the male members of the Bands.

the lands to tribal ownership. (Emphasis added.) That was done, as to the lands now constituting the Ute Mountain Reservation, by the Act of 1895. But until that time, as we show in our main brief, there were no rights of tribal ownership in any of this land.

2. If by its argument that the 1880 Act was merely "executory" respondent means to suggest that it effected no cession, then respondent has taken itself outside the parameters of this case. The issue here is what the 1950 settlement agreement meant when it referred to lands ceded by the 1880 Act; it would be strange for one of the signatories to that agreement to assert that no lands were ceded, as respondent's present emphasis on the Act of 1882 would suggest.

The language of the settlement agreement must be given content, and so we must assume for its purposes that reservation lands *were* ceded to the United States by the 1880 Act, subject perhaps to the necessity of future legislation to make them available to the public at large. The 1882 Act was such a provision, opening to public settlement that part of the former reservation against which no claim for allotment could any longer be made.

As Congress recognized, the government's actions after 1880 left the Southern Utes "in the anomalous condition of having ceded their reservation and yet remaining upon it." H. Rep. No. 799, 53d Cong., 2d Sess., 2; S. Rep. No. 279, 53d Cong. 2d Sess., 2. The Act of 1895 was passed to remedy that situation. Out of the lands which had been ceded to the government in 1880, the Act created a new reservation, provided

for the possibility of allotment of other lands to interested and able Indians over a brief period of time, and otherwise opened the land to public claim.

The Act contains no language of cession, which its legislative history recognized as having been accomplished in 1880. Section 2 provides for allotments; Section 3 sets aside a reservation for those who would not take allotments; and Section 4 opens the unallotted lands to occupancy and settlement—in precisely the same manner as had the 1882 Act. All of this was to be done, it is implicit, with what were already public lands by virtue of the 1880 Act, albeit lands impressed by that Act with fiduciary duties vis-à-vis the Indians.[3] Respondent relies (Br. 30) on the language

[3] We note again our view that these duties ran to a group larger than the two bands of Utes which have brought this suit. The Weeminuche, or Ute Mountain, Utes were part of the Southern Ute Tribe as it was constituted at the time of the 1895 Act, and hence shared a beneficial interest in the proceeds due to the Southern Utes under the 1895 Act—an interest held foreclosed to them below by their failure to associate themselves with this suit before the passage of the time set by statute for the filing of claims. See Pet. Br. 37 n. 13. In addition it could be argued that the White River and Uncompahgre Utes had interests in the proceeds of the land under the terms of the 1880 Act, just as respondent appears to have shared in the proceeds of the northern part of the reservation.

Whether it was in Congress' power to abrogate these interests, as in effect was done by the 1895 Act, need never be decided, since any such argument has been compromised by the settlement of 1950. But in assessing the failure of these other Ute bands to make such a claim, on which respondent apparently relies, Resp. Br. 8–9, 30–31, 42, it should be noted that they specifically compromised those claims in a resolution, subsequently accepted by Congress, specifically stating how the 1950 judgment should be divided. 65 Stat. 194 (25 U.S.C. 672). Since the

of Section 3 as recognizing complete and absolute tribal ownership of the land. So it does. But the fallacy of the argument is that it assumes that this was in some measure a recognition of continuing tribal rights under the 1880 Act. The rights of tribal ownership recognized were created by the 1895 Act; had it been otherwise, there would have been no necessity for the 1895 Act to "set apart and reserve" to the Indians that land.

3. Respondent's extensive references to the manner in which the Ute lands were administered after 1895 can be relevant only in assessing what counsel might reasonably have understood by the reference in the settlement agreement to lands "formerly owned or claimed by [the Confederated Bands of Utes] in western Colorado, ceded to the defendant by the Act of June 15, 1880." We could not deny that statements can be found in various places, like the *dictum* in *Hiram M. Hamilton,* 32 L.D. 119, Resp. Br. 47, and the Restoration of 1938, App. 85, reflecting a mistaken understanding of the 1880 Act as having reserved tribal

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other bands' potential claims are now barred, respondent's present assertion that the interests in these lands are not joint is gratuitous. When respondent appeared with the other members of the Confederated Bands in this Court in 1947, it was equally emphatic that in the 1880 Act,

> The chiefs and headmen agreed to attempt to persuade their people "to cede * * * all of * * * the present Ute Reservation." R. 26. The only thing reserved to petitioners [the Confederated Bands, including the Southern Utes] was the right to individual allotments. * * *

Confederated Bands of Ute Indians v. *United States*, 330 U.S. 169, No. 141, O.T., 1946, Pet. Br. 16 n. 4; see also *id.* at 24 n. 6, and our main brief at pp. 11–12, 25–26.

rights in land to the Southern Utes. But in considering the understanding of counsel, we find their own contemporary statements more persuasive. Counsel understood in 1947 that the "central purpose of the act" was "to acquire *all* of the land of the then 'present Ute Reservation,' " No. 141, O.T. 1946, Pet. Br. 23 (emphasis added), and that the sale "exceptions were 'unoccupied agricultural lands on the La Plata River,' 'agricultural lands on Grand River,' etc. (Sec. 1), *for individual allotments.*" *Id.* at 24 n. 6 (emphasis added); n. 3 *supra*. That is the correct understanding of the Act's purpose and effect. It makes clear both that all tribal rights were ceded by the 1880 Act and that the 1950 settlement agreement forecloses the present claim.

II. THE ACCOUNTING ISSUES

The government's contentions regarding the accounting issues are, first, that respondent is jurisdictionally limited in its accounting demands to funds which can be traced to the proceeds of the sale of approximately 82,000 acres put in issue by its petition before the Commission;[4] and, second, that respondent is entitled in this proceeding to redress only of those

[4] It could, indeed, be doubted whether respondent's claims go even this far. Its assertion of damages, so far as here relevant, was initially limited to "an amount equal to that *received by defendant*" for the sale of the 82,000 acres, without mention of revenues those sums might have produced in government hands once received. App. 13 (Paras. 9c, d); emphasis added. That amount is precisely the amount already accounted for in other proceedings, n. 1, *supra*. But the government does not contend that the Court of Claims' relation back theory was improper as applied to the funds derived from the 82,000 acres.

errors in handling its funds which occurred before August 13, 1946.

Respondent appears now to state that it does not challenge the first of these contentions, and that it claims no funds through its exceptions other than those to which it is entitled as a result of the mishandling of funds specifically derived from the sale of the 82,000 acres. Resp. Br. 53 *et seq.*, 70. We did not previously understand its claims to be so limited;[5] nor, we think, did the Court of Claims or the Indian Claims Commission. So far as the "relation back" theories adopted by those bodies are concerned, we ask in this Court only that that limitation be made clear; the sorting out of matters which do and do not relate to funds resulting from the sale of the 82,000 acres can most appropriately be done below, on remand. Pet. Br. 31 n. 7. We agree that the government must furnish a complete and proper accounting in

[5] Respondent takes the government to task for giving as an example an exception which respondent says was rejected by the Commission and Court of Claims, the exception relating to the Proceeds of Labor fund. Resp. Br. 59. But the Commission did not reject the exception as outside its authority to entertain, as it should have done. It rejected only so much of the exception as asserted that the fund in question should have received interest at a 5 percent rate, holding that only 4 percent was due. App. 51–52. And having reached that conclusion, it required the United States to prepare a proper accounting of that fund at the 4 percent rate, and to bring that accounting up to date. App. 52. Since this fund does not include the proceeds of the sale of the approximately 82,000 acres, it is clear that the exception ought not to have been entertained, and that the United States ought not to have been subjected to this obligation. Respondent's suggestion that the government suffered no consequence by the Commission's ruling, affirmed without discussion by the Court of Claims, is erroneous.

this case of the funds from "the sale of approximately 81,953.18 acres" (App. 13); but it has no obligation in this case to account for other funds which may be mingled with those funds, or held in separate accounts. To the extent the court and Commission below believed that respondent sought to impose such an obligation and permitted it to do so, the government is entitled to have that error, now apparently conceded, corrected.

Regarding the second contention, we note again the distinction between respondent's undoubted right to have pre–1946 wrongs redressed up to the moment of judgment, and its assertion of a right in this proceeding to learn about and redress government mishandling of its funds occurring after 1946 through the medium of the extensive accounting obligation it seeks to impose. Thus, if the government wrongly failed to deposit funds derived from the sale of the 82,000 acres of land in an interest-bearing fund in a prior year, say 1935, respondent is entitled to redress of the damage it suffered to and including the date of judgment. The government could show, in mitigation of damage, that it had properly deposited the funds subsequently, for example in 1962, reducing its liability to that extent. But on the hypothetical given, respondent would certainly be entitled to full redress. We understand its claim here to be somewhat different. Respondent wishes to be able to examine how the government handled its money in 1957, or 1968, and to make claims for judgment on the basis of errors freshly made at that time. No other purpose could be served by demanding an accounting for those years. And that pur-

pose is improper under the statute limiting the Commission's authority to claims arising before August 13, 1946.

CONCLUSION

For these reasons, and the reasons stated in the government's principal brief, the decision of the Court of Claims should be reversed.

Respectfully submitted.

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FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* SOUTHERN UTE TRIBE OR BAND OF INDIANS

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 515. Argued March 1, 1971—Decided April 26, 1971

Respondent's claims for compensation and accounting are barred by *res judicata* since they relate to land "formerly owned or claimed by [the Confederated Band of Utes] in western Colorado, ceded to [the United States] by the Act of June 15, 1880" and thus were subject to a final settlement reduced to a consent judgment, to which respondent was a party, made in 1950. Pp. 3–15.

191 Ct. Cl. 1, 423 F. 2d 436, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 515.—October Term, 1970

United States, Petitioner, *v.* Southern Ute Tribe or Band of Indians.	On Writ of Certiorari to the United States Court of Claims.

[April 26, 1971]

Mr. Justice Brennan delivered the opinion of the Court.

In 1951 the Southern Ute Tribe or Band of Indians, a part of the Confederated Bands of Utes, brought this claim before the Indian Claims Commission.[1] The claim asserted that the United States had violated its fiduciary duty to respondent by (1) disposing of 220,000 acres of land as "free homesteads" although obligated by 21 Stat. 203–204 (1880) and 28 Stat. 678 (1895) to sell the acreage for the respondent's benefit; and (2) by failing to account for the proceeds of 82,000 acres of land, which proceeds were, under the same acts, to be held for the respondent's benefit. The Government's basic defense was *res judicata* by reason of Court of Claims consent judgments entered in 1950 between the United States and the Confederated Bands of Utes, including the respondent.[2] *Confederated*

[1] The claim was filed pursuant to the Indian Claims Commission Act, 25 U. S. C. § 70a. See also 25 U. S. C. § 70k.

[2] The 1950 cases were brought under the Jurisdictional Act of 1938, 52 Stat. 1029. The settlement reduced to consent judgment principally relied upon by the Government is that in Case No. 46640, 117 Ct. Cl. 433, 436 (1950). Related stipulations are reported at 117 Ct. Cl. 434–435, 439, 440–441. The aggregate amount of the settlements exceeded $31 million. The United States also unsuccessfully asserted below defenses of failure to state a claim and failure to join all necessary parties. Those questions are not before us.

Bands of Ute Indians v. *United States*, 117 Ct. Cl. 433 (1950). The Indian Claims Commission rejected the defense, 17 Ind. Cl. Comm. 28 (1966); but the Court of Claims, in an unpublished order, App., at 57–58, remanded for the taking of additional evidence. On remand the Commission again rejected the defense, 21 Ind. Cl. Comm. 268 (1969), and the Court of Claims affirmed, two judges dissenting. 423 F. 2d 346 (1970). We granted certiorari. 400 U. S. 915 (1970). We reverse.

The consent judgment entered in the Court of Claims gave effect to a settlement agreement which recited a stipulation of the parties that:

> "[A] judgment . . . shall be entered in this cause as full settlement and payment for the complete extinguishment of plaintiffs' right, title, interest, estate, claims and demands of whatsoever nature in and to the land and property in western Colorado *ceded by plaintiffs to defendant by the Act of June 15, 1880* (21 Stat. 199), which (a) the United States sold for cash . . . (b) disposed of as free homesteads . . . and (c) set aside for public purposes [between 1910 and 1938]. . . . There is filed herewith and made a part of this stipulation Schedule 1, which contains the legal descriptions of [lands] . . . disposed of by defendant as free homesteads and the remaining . . . acres . . . set aside by the defendant for public purposes. . . . However, the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but . . . also *as to any land* formerly owned or claimed by the plaintiffs in western Colorado, *ceded to defendant by the Act of June 15, 1880* . . . ." 117 Ct. Cl., at 436–437 (emphasis added).

The lands involved in the present suit were not included in Schedule 1; rather, the Government relies upon the

clause that the consent judgment was "res judicata . . . also as to any land . . . ceded to defendant by the Act of June 15, 1880 . . . ."

Both the Indian Claims Commission and the Court of Claims rejected the Government's *res judicata* defense on the ground that the claim concerning the lands involved in this action was not compromised by the 1950 settlement because those lands were not among the lands "ceded to defendant by the Act of June 15, 1880."

Decision of this case turns, then, upon the proper interpretation of the agreement, embodied in the Act of 1880, between the United States and the Ute Indians as it relates to the settlement agreement, reduced to judgment in 1950, between the same parties. The determination of that interpretation requires a somewhat lengthy factual recitation.

In the latter half of the 19th century, what is now the Confederated Bands of Utes, composed of the Uncompahgre Utes, the White River Utes, and the Southern Utes, exchanged their aboriginal lands in New Mexico, Utah, and Colorado for a reservation of approximately 15.7 million acres lying wholly within Colorado. 13 Stat. 673 (1864); 15 Stat. 619 (1868). Although the acreage was undivided, the White River Utes lived in the northern portion of the reservation, the Uncompahgre Utes inhabited the central part, and the Southern Utes occupied the southern region. The reservation, however, survived little longer than a decade in this form. In 1874 the Utes approved the Brunot Cession of 3.7 million acres of the east-central portion of the reservation after valuable mineral deposits had been discovered there. 18 Stat. 36 (1874).[3] The result of the cession was almost

[3] The United States admits that the stated consideration was not promptly paid. Brief for Petitioner, at 5. See also J. Dunn, Massacres of the Mountains 583–587 (1958).

to sever the reservation, leaving the Southern Utes wedged between the southern boundary line of the Brunot Cession and the New Mexico border, at the southern-most part of the reservation on a strip of land 15 miles wide and 110 miles long. This strip, which includes the lands at issue here, is referred to by the parties as Royce area 617, and the remainder of the reservation after the Brunot Cession is referred to as Royce area 616.[4]

Within eight years only the Southern Utes remained in Colorado: the White River Utes and the Uncompahgre Utes departed for Utah before 1882 as a consequence of the massacre in 1879 of Indian Agent Meeker and others at White River station. The public outcry over this incident led to negotiations with the Confederated Bands which produced the Act of 1880.

The central feature of the Act of 1880 was the termination of tribal ownership in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians. The purposes of that provision were to destroy the tribal structure and to change the nomadic ways of the Utes by forcibly converting them from a pastoral to an agricultural people. See 10 Cong. Rec. 2059, 2066 (1880). The Act recited that it was enacted to accept "the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State . . . ." 21 Stat. 199 (1880). Thus, it was provided that the Confederated Bands "cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement." 21 Stat. 200 (1880). The settlement

[4] These derive from a map of Indian land cessions drawn by Charles Royce in connection with a published study "Indian Land Cessions," 18th Ann. Rep., B. A. E. 1896–1897, Part. II.

provisions stipulated that the White River Utes would leave Colorado "and settle upon agricultural lands on the Uintah Reservation in Utah," *ibid.*, and "that the Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado," *ibid.*, or if insufficient agricultural land was found there, go to Utah (which they soon did). The Southern Utes were to "remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico." *Ibid.* Finally, it was provided that "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal," but only for the financial benefit of the Utes. 21 Stat. 203–204 (1880).

The plain wording of the Act cedes to the United States all of the nonallotted acreage of the reservation, including that in the 15-mile strip (Royce area 617) occupied by the Southern Utes. The Court of Claims' opinion acknowledges this, stating that:

> "The most significant aspects to be gleaned from this [1880] Act . . . is that the Confederated Bands (Southern Utes included) seemed to cede their *entire* reservation—Royce Area 616 *and* 617—and moreover promised to accept allottments in severalty in various sectors within and beyond reservation boundaries. As sole consideration for these promises, the Bands were to receive shares in the proceeds of unallotted land sales remaining after certain Govern-

> ment reimbursements. The Southern Utes were apportioned a one-third share and like their confederates understood that such monies would be held by defendant in trust for their benefit." 423 F. 2d 346, 350 (1970) (emphasis in original).

Thus, if inquiry were to end with the wording of the 1880 Act, the consent judgment barred respondent's claim.

The Commission and the Court of Claims did not, however, end their inquiry with the wording of the Act of 1880. Both of those tribunals considered the conduct of the United States in relation to respondent tribe in the years subsequent to passage of the Act of 1880. Even so, the basis of their rejection of the *res judicata* defense does not emerge from their opinions with complete clarity. The Court of Claims read the Commission's first opinion, 17 Ind. Cl. Comm. 28 (1966), as holding that the Southern Utes expressly withheld the southern strip from the lands ceded by the 1880 Act: "The Commission found that the Act of 1880 'reserved' Royce Area 617 for the Southern Utes." 423 F. 2d, at 350. Some language at that point of the opinion suggested that the Court of Claims was in agreement with that view—"the following sequence of events . . . support the conclusion that plaintiffs at any rate did not cede their reservation (Royce Area 617) under the agreement of 1880." *Ibid.* However, the opinion later turns the decision on a different theory:

> "The more tenable theory, in our estimation, is that Congress recognized that by its protracted acquiescence in the Southern Ute occupation, Government rights to the land had somehow lapsed, or the agreement not being executed for so long a time, was rescinded and dead. It may be that the obligation to deal justly and honorably with the Indian wards did not allow insistence on full implementation of the apparent terms of the 1880 agreement. On the

other hand, the Southern Utes obviously did not see themselves as mere squatters. The Congress therefore decided that if the land was going to be acquired free and clear new consideration was necessary. Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." *Id.*, at 356.

This reasoning implies that the holding that the lands in suit were not ceded in 1880 rests upon application of the doctrines of estoppel, or waiver, or a compound of those doctrines. We disagree that the history relied on supports any of those bases for decision, even assuming (and we have serious doubts) that the plain words of the Act of 1880 can thus be varied to except the lands in suit from the phrase "any land . . . ceded" in the consent judgment. We turn, then, seriatim to the events relied upon below.

Even before 1880 the Southern Utes had experienced hardship in living on the southern strip. Essentially, they were a pastoral people and the strip was so narrow that it was difficult to keep their animals within it. In addition, the white population to the north and south of the strip was increasing and the resulting lines of commerce cut across the strip.

"The Indian Bureau, realizing that this strip, by reason of its narrowness and of its remoteness from the other portion of the reservation, was entirely unsuited to the use of the Indians, suggested that negotiations be entered into with them for the cession of that strip. In accordance with this, in 1878, Congress passed an act authorizing such negotiations (U. S. Stat. L., vol. 20, p. 48), and under this authority a commission . . . was appointed, and during

> the same year they negotiated an agreement with the Indians whereby they agreed to exchange this strip for another reservation." S. Rep. No. 279, 53d Cong., 2d Sess., 1 (1894).

But before the bill was acted upon by Congress, the Meeker Massacre occurred.[5] The outcry following that incident caused Congress to adopt the solution in the Act of 1880 affecting all of the Ute tribes. Contrary to the apparent view of the Commission and Court of Claims, this segment of history does not show an intention to treat the Southern Utes differently from the other Utes; rather, it demonstrates a congressional decision to treat the Southern Utes as the White River and Uncompahgre Utes were being treated, save that the White River Utes were being completely banished from Colorado.

The Act of 1880 provided that "a commission shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support . . . ." 21 Stat. 201 (1880). The Commission visited the Southern Utes to carry out that mandate and in 1881 its chairman reported to Congress:

> "During my stay on the reservation I took occasion . . . to talk to the leading men . . . on the subject of their location in severalty. In these conversations I called their attention to the fact that the work the surveyors were doing was the preliminary step to such location [in severalty] . . . .

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[5] While apparently the "massacre" involved only the White River Utes, all Utes were blamed. See exchange of correspondence during the uprising among the Indian agents, Secretary of the Interior, Governor of Colorado, and others printed in S. Ex. Doc. No. 31, 46th Cong., 2d Sess. (1880). See also J. Dunn, Massacres of the Mountains (1958), and P. Sheridan, Record of Engagements with Hostile Indians 88–91 (1882).

I did not find one who desired a house, or would agree to dwell in one if built for him on his own land. It will take time and careful management to induce these Indians to abandon their present [way of living] and adopt the new mode of life contemplated by the agreement.

"In the mean time, and while the change is going on, they must be protected from annoyance . . . . To prevent intrusion and guarantee proper order and protection I can see no other way than to so modify the [1880] agreement, . . . as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation . . . . Then the land selected, and upon which the Indians are to be located, can be kept free from intruders." H. R. Ex. Doc. 1, pt. 5, 47th Cong., 1st Sess., 393 (1882).

But Congress did not create the recommended reservation. Instead, Congress took action consistent with adherence to the plan of the Act of 1880. There had been great pressure to open Royce areas 616 and 617 to homesteading after the Act of 1880 had resulted in the removal of the Uncompahgre and White River Utes. The Southern Utes were, however, still occupying the southern strip, Royce area 617. The apparent result was the Act of July 28, 1882, 22 Stat. 178, which declared that all of the northern portions of the reservation formerly occupied by the Uncompahgre and White River Utes, Royce area 616, were now public lands to be disposed of for the benefit of the Utes in accordance with the Act of 1880. Section 2 of that statute provided that the Secretary of the Interior "shall, at the earliest practicable day, ascertain and establish the line between" the two Royce areas. 21 Stat. 178 (1882). We find nothing in the legislative history of that statute to support a finding that it

evidenced a congressional conclusion that the southern strip had not been ceded by the Act of 1880. On the contrary, the thrust of the legislative history is that the line was drawn to assure that there would be no interference with the land in Royce area 617 available for allotment to the Southern Utes under the Act of 1880. H. Rep. No. 799, 53d Cong., 2d Sess., 2 (1894); S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4 (1894).[6]

The Court of Claims also found support for its conclusion in what was said to a congressional committee by a Ute spokesman for the Southern Utes at a meeting in the District of Columbia in 1886. The spokesman stated that the delegation had come "to see if we cannot exchange our reservation for another . . . . The present reservation is narrow and long and we want to go west and see if we can't sell it." S. Rep. No. 836, 49th Cong., 1st Sess., 1 (1886). The Court of Claims viewed this as demonstrating that "the Southern Utes were still in possession of their part of their old reservation under claim of right." 423 F. 2d, at 353. We do not doubt that the Southern Utes regarded the lands they occupied as "our reservation," but we fail to see how this nullifies the conveyance of the strip made by the Act of 1880. On the contrary, there is cogent evidence that the United States totally rejected the Indians' claim that the strip was 'our reservation." After two bills to effectuate the removal of the Southern Utes failed to pass, Congress enacted 25 Stat. 133 (1888) empowering "[t]he Secretary of the Interior . . . to appoint a commission . . . with

[6] The Court of Claims found proof that "the Interior Department at least was already viewing the Southern Ute territory as a permament reservation not ceded under the terms of the 1880 cession," 423 F. 2d, at 352, in a description of the line in an 1882 letter to the district land offices. We find nothing in the letter to that effect, and in any event, it could hardly be the basis for disregarding the congressionally expressed design.

authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as may be deemed desirable by said Indians and the Secretary of the Interior . . . ." *Ibid.* Despite the reference to "their reservation," the premise of this statute was obviously that amelioration of the plight of the Southern Utes would require "modification of their treaty and other rights" as they had been fixed in the Act of 1880. Even the Court of Claims thought the Act of 1888 little support for the respondents' contention:

> "Although the language of this act tends to favor plaintiffs' position it is by no means conclusive. It merely authorized the establishment of a commission to engage the Southern Utes in negotiations for the purpose of persuading them to do belatedly what the Uncompahgre and White River Utes had done some years earlier, namely, to vacate their reservation and move elsewhere. A reasonable explanation for the act's exclusive terms is that the Southern Utes were the only band of the confederation as to whom the 1880 agreement was still executory." 423 F. 2d, at 353–354.

The Commission formed pursuant to the Act of 1888 did succeed in negotiating an agreement with the Southern Utes, under which the Southern Utes would have been moved to a reservation in San Juan County, Utah. The Court of Claims observed that in such case "[p]resumably, their evacuated reservation lands would then be sold in accordance with the Act of 1880 and the proceeds would be held for the collective benefit of the Confederated Bands in the prescribed proportions that is, the consideration visualized in the 1880 agreement as accruing to the Southern Utes would still accrue." 423 F. 2d, at 354. In other words, the treatment of the

Southern Utes would be precisely that accorded the Uncompahgre and White River Utes when they left Colorado. But this event only serves to furnish still more proof that the Government remained firm in its position that the strip was ceded by the Act of 1880.

This is confirmed by the congressional reaction when the agreement was submitted for approval—nothing happened for six years and the agreement was again introduced in 1894. The opinion of the Court of Claims depicts the situation:

> "Conceding the 'anomalous position [of the Southern Utes] of having ceded their reservation and yet remaining on it', the Senate Committee on Indian Affairs favored ratification (Sen. Rep. No. 279, 53d Cong. 2d Sess. 2–3 (1894)). Its House counterpart, although concurring in the view that the Southern Utes presented an anomalous situation, did not assent to ratification (H. R. Rep. No. 799, 53d Cong., 2d Sess. 2–3 (1894)). It believed that the proposed reservation was too large for the Southern Utes and hence would encourage their nomadic ways. Therefore, instead, the House Committee recommended enactment of a pending bill which was eventually passed as the Act of February 20, 1895 (28 Stat. 677). The stated purpose of this Act was to annul the agreement of 1888 and enforce the treaty of 1880 which sought to settle the Indians in severalty." 423 F. 2d, at 354.

This recital refutes, rather than supports, the notion that the United States followed a pattern or course of conduct after 1880 which regarded the Southern Utes rather than the United States as the owners of Royce area 617.

Finally, we cannot agree with the Court of Claims that § 5 of the Act of 1895 is "an explicit waiver of the Government's rights created in the 1880 agreement, what-

ever they were." 423 F. 2d, at 356. The Act of 1895, in addition to annulling the 1888 agreement, expressly confirmed the Act of 1880 and directed the Secretary of the Interior to proceed with allotments in severalty to the Southern Utes "in accordance with the provisions of the Act of [1880]." 28 Stat. 677 (1895). It went on to settle the grievances of those Southern Utes who wanted their own reservation rather than allotments in severalty by providing that "there shall be . . . set apart and reserved all that portion of their present reservation lying west of" a defined line in the strip. 28 Stat. 678 (1895). We do not see how the United States could have "set apart and reserved" a portion of the strip for a reservation unless the strip belonged to it. The remainder of the strip to the east of the new reservation was to be available for allotments in severalty to individual Southern Utes and the land not allotted was to "be and become a part of the public domain" to be sold for the benefit of said Utes. *Ibid.* Section 5 allocated the proceeds from sales of the land opened to public settlement. We look in vain for anything in that section to support conclusion of the Court of Claims that it contains an "explicit waiver" by the United States of its rights under the Act of 1880 and that "[i]t follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." 423 F. 2d, at 356. The Senate Report recommending passage of the Act of 1895 belies that conclusion. The report repeats, once again, the previously stated position of the Congress that "[o]n March 6, 1880, [the Utes] . . . ceded the whole of their reservation in Colorado to the United States, except such lands, if any, as might be allotted to them in severalty." S. Rep. No. 279, *supra*, at 2. We discern nothing in § 5 save some revision of the formula for allocation of the proceeds of the sales of the unallotted lands in the portion

of the strip east of the reservation.[7] We find absolutely no language that the Southern Utes made any cession thereby, and, indeed, we are convinced that the wording is consistent only with the fact that they had no land to cede.[8] The Act of 1895 simply resolved the impasse

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[7] Section 5 of the Act of 1895 provides in pertinent part:

"That out of the moneys first realised from the sale of said lands so opened up to public settlement there shall be paid to said Indians the sum of fifty thousand dollars, as follows: Five thousand dollars annually for ten years . . . to be equally divided among all of said Indians per capita, irrespective of age or sex; also the sum of twenty thousand dollars of said proceeds shall be paid to the Secretary of the Interior, who shall invest the same in sheep and divide the said sheep among the said Indians per capita equally, irrespective of age or sex; [certain allotments also made to specific chiefs and headmen] . . . that the balance of the money realised from the sale of lands, after deducting expenses of sale and survey, shall be held in the Treasury of the United States in trust for the sole use and benefit of said Southern Ute Indians. That nothing herein provided shall in any manner be construed to change or interfere with the rights of said Indians under any other existing treaty regarding any annuities or trust funds or the interest thereon." 28 Stat. 678 (1895).

[8] The Court of Claims also seems to have placed some reliance upon the following words in an order of the Acting Secretary of the Interior in 1938 which restored to the Southern Utes that portion of Royce area 617 yet undisposed of:

"[P]ursuant to the provisions of the Act of February 20, 1895 (28 Stat. L., 677), the Southern Ute Band of Indians in Colorado ceded to the United States a large area of their reservation in the State of Colorado established expressly for their benefit under the treaty of June 15, 1880 (21 Stat. L., 199)," S. Doc. No. 194, 76th Cong., 3d Sess., 659 (1938) (compiled by C. Kappler).

The Court of Claims suggested that these words demonstrated that "[petitioner's] officials . . . not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement." 423 F. 2d., at 356.

As we have said in this opinion, we find no creation of a reservation for the Southern Utes in the Act of 1880, nor can we find any words of cession in the Act of 1895. In addition, rather than attach-

over the allotments in severalty which had existed for 15 years because of the Southern Utes' reluctance to accept them. The United States created a new reservation for them, while still permitting allotments to those Southern Utes willing and qualified to engage in farming. This plan was clearly constructed in reliance upon, not in derogation of, the cession made under the Act of 1880.

We therefore hold that the claim in this case is *res judicata* under the 1950 consent judgment enforcing the settlement agreement "as to any land . . . ceded to defendant by the Act of June 15, 1880." [9]

Reversed.

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ing the significance suggested by the Court of Claims, the quoted words are more properly to be treated as careless draftsmanship: the time of cession, whether 1880 or 1895, was of absolutely no consequence to the act of restoration of undisposed lands in 1938. Finally, the quoted words do not support the application here of the principle that courts should give weight to a consistent reading of an ambiguous document by the agency charged with its enforcement. As our opinion shows, we do not find either the Act of 1880 or that of 1895 ambiguous. Moreover, what consistency the parties have shown in the enforcement of those acts, cuts against the contention of the respondent.

[9] The Court of Claims unreported order remanded the case to the Commission "for the hearing of additional evidence and the making of findings of fact with respect to the intention of the parties to the stipulation upon which a final judgment was entered in Court of Claims Case No. 46640 (117 Ct. Cl. 436) on July 13, 1950." App., at 57. The Commission's supplemental findings after the hearing on remand are reported in 21 Ind. Cl. Comm. 268. We question the propriety of the remand, see *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127, 140–141 (1904); *United States* v. *William Cramp & Sons Ship & Engine Building Co.*, 206 U. S. 118, 128 (1907), but do not decide the question since it does not appear that the decision of the Court of Claims turned on any evidence of the intention of the parties to the stipulation.

SUPREME COURT OF THE UNITED STATES

No. 515.—October Term, 1970

United States, Petitioner, v. Southern Ute Tribe or Band of Indians.	On Writ of Certiorari to the United States Court of Claims.

[April 26, 1971]

Mr. Justice Douglas, dissenting.

Though the facts of this case are complex, they present but one major question, whether the lands in question were "ceded to defendant by the Act of June 15, 1880," and included in a consent judgment entered by the Court of Claims in 1950.

More precisely, what was the status of these lands (Royce Area 617) between 1880 and 1895? Were they ceded in 1880, yet not released by the Indians until 1895? How can it be said that the Royce Area 617 was ceded in 1880 yet retained until 1895, since, as the Court of Claims stated, "the Southern Utes were allowed to remain on their surveyed reservation for 15 years after the purported cession, and the right to remove them without their further consent was not asserted or exercised." 423 F. 2d 356.

Twice the facts have been considered, once by the Indian Claims Commission and once by the Court of Claims. And both have resolved the question presented in favor of the respondent, Southern Utes. That result below is amply supported by the record.

As of 1880, the Confederated Bands of Ute Indians occupied a reservation of 12,000,000 acres in Western Colorado. The White River Utes and the Uncompahgre Utes occupied the northern portion (Royce Area 616),

and the Southern Utes occupied an almost separated southern section (Royce Area 617). In 1880, the Utes entered into a treaty with the United States. It provided that the chiefs would persuade their people

> "to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.
>
> "The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico." (21 Stat. 199, 200.) Act of June 15, 1880.

The cession of the territory was on the express condition:

> "That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty. . . ." (*Id.*, at 200–201.)

The Secretary of the Interior was authorized to have the land surveyed for allotment. Commissioners were to make the allotments,

> "and all lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States. . . ." (*Id.*, at 203.)

The Ute Commission was formed. In 1881 it reported to Congress. The Uncompahgre and White River Utes had been removed, but the Southern Utes were still on their reservation. The Chairman of the Commission had de-

cided that it would be unwise to move them.[1] The allotments, a condition of the cession, were not made. In 1882, Congress declared Royce Area 616 to be public land (22 Stat. 178). It provided that a line be established between Royce Area 616 and Royce Area 617. (§ 2, *id.*) The Secretary of the Interior ordered the line to be drawn "[c]ommencing *at* the southwest corner of the Ute *ceded* lands; thence extending the south *boundary* of the Ute *ceded* lands to the western boundary of the State of Colorado. (Emphasis supplied.)[2]

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[1] It has been suggested that the Indians refused to take the allotments or were stalling. This appears inconsistent with the report of Mr. Manypenny, the Chairman of the Ute Commission. The white settlers were dissatisfied at learning that the Indians might be allowed to settle in certain valleys which the settlers desired. The allotment, and sale of the residue to whites, would leave the Indians in "close proximity to the white settlements [and] will subject the Utes . . . to constant annoyance by evil-disposed persons." The Indians had to be protected from this.

"To prevent intrusion and guarantee proper order and protection I can see no other way than to so modify the [1880] agreement, so far as these Indians are concerned, as to maintain the exterior lines of the strip of land one hundred miles long and fifteen wide, and preserve all the land within these lines for an indefinite period as an Indian reservation, and let the United States laws in relation to Indian reservations have full force therein. Then the land selected, and upon which the Indians are to be located, can be kept free from from intruders." (H. R. Doc., Vol. 10, Ser. No. 2018, 47th Cong., 1st Sess., 383, 393 (1881)). He did indicate that the Indians did not want to live in houses, but not that they would not accept the allotments.

[2] "From this description it would seem that the Interior Department at least was already viewing the Southern Ute territory as a permanent reservation not ceded under the terms of the 1880 cession. Specifically, the letter states that the survey line commence *at*, not *in*, the southwest corner of the ceded Ute land. Adhering to defendant's contention that *all* lands were ceded in 1880, a literal interpretation of this letter would lead to an anomalous result. If the starting point was placed *at* the southwestern corner of Ute ceded land, the point would coincide with the converging point of the

As of this time it appears that neither the Southern Utes nor officials of the United States thought that Royce Area 617 had been ceded by the Act of 1880. The Southern Utes still considered it their reservation[3] and the Commissioner of Indian Affairs apparently felt likewise[4]—all of which is inconsistent with the theory that there had been a cession of it in 1880.

In 1888, Congress authorized the Secretary of the Interior to appoint a commission to negotiate with the Southern Utes. They agreed to settle in Utah, but Congress would not approve the agreement. Congress then passed the Act of 1895, 28 Stat. 677:

> "That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of land, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in *their present reservation* in Colorado, such allotments to be made in accordance with the provisions of the Act of [1880] . . . and amendments thereto. . . ." (§ 2, *id.*)
>
> "That at the expiration of six months from the passage of this Act the President . . . shall issue his proclamation declaring the lands embraced within

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New Mexico, Colorado and Utah borders. The line could not extend to the western boundary of Colorado because it would start there." *United States* v. *Southern Ute Tribe or Band of Indians*, 423 F. 2d 346, 352 (C. Cls. 1970).

[3] The Southern Utes came to Washington in 1886 to negotiate for an exchange of their reservation for one to the west. See S. Rep. No. 836, 49th Cong., 1st Sess., 1–2 (1886).

[4] On April 5, 1888, he reported to the Secretary of the Interior, "[W]e are bound by solemn treaty stipulations with these Indians to prevent white people from entering upon or crossing said reservation." (*Id.*, at 3.)

the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of *this Act*, open to occupancy and settlement. (§ 4, *id.*, at 678.) (Emphasis added.)

The money realized from the sale of the lands set aside was to be held for the sole benefit of the Southern Ute Indians. Section 6 declared that the provisions of the Act were not to take effect until accepted by a majority of the male adult Indians. A majority did accept.

Some of the Southern Utes took allotments in severalty. The Weeminuche Utes, now the Ute Mountain Utes, elected, however, to settle on a tract at the west end of their "present reservation." (§ 3, *id.*)

A substantial amount of land in Royce Area 617 was settled by whites, and disposed of by the United States Government. The subject of the present suit before the Indian Claims Commission includes, *inter alia*, the proceeds from land sold and damage for land given away in violation of the Act of 1895.

In 1934, Congress allowed restoration of all land in Royce Area 617 not disposed of under the Act of 1895. (48 Stat. 984.) The Secretary of the Interior restored all such land to the tribal sovereignty of the Southern Utes. That order began:

> "pursuant to the provisions of the Act of February 20, *1895* . . . the Southern Ute Band of Indians in Colorado *ceded* to the United States a large area of their reservation in the State of Colorado *established expressly for their benefit under the treaty of June 15, 1880*. . . ." (Order of Restoration, September 14, 1938, 5 Kappler 659.) (Emphasis added.)

The Confederated Bands have sued the United States in the past for damages arising out of breaches of the 1880 treaty. One such suit was settled in 1950, and

judgment was entered pursuant to a stipulation of the parties. A schedule of all land covered by the judgment was included, but omissions were provided for:

> "So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata*, not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 . . . ." (117 C. Cls. 433, 437.)

None of the land in Royce Area 617 (360 sections or 21.8% of the total area which had been wrongly disposed of) was therefore included.

The Indian Claims Commission found that the United States had acknowledged by its actions that the Southern Ute Reservation was not ceded by the 1880 Agreement. Therefore any accounting which included Southern Ute lands in Case N. 30360, 45 C. Cls. 440 (1910), was erroneous and beyond the jurisdiction of the Court of Claims to enter. The Court of Claims remanded this case to the Commission for a determination of the intention of the parties in entering into the 1950 stipulation. Plaintiffs produced evidence that they never intended Royce Area 617 to be covered. The broad language of the stipulation was to insure that minor omissions were covered. "Diligence" would not have permitted the exclusion of 360 sections of land. The Government refused to produce any documents which might have disclosed the intent of its signatories, claiming this was the "work product." The Commission found no intent to include land in Royce Area 617 in the stipulation.

The Court of Claims found that the language of the Act of 1880 *appeared* to be inconsistent with the findings of the Commission, but that the events from 1880 to 1895

supported its conclusion, *i. e.*, the decision to postpone issuing allotments and to preserve the reservation, the separation of Royce Area 617 by the Act of 1882, the description of the dividing line by the Secretary of the Interior, the negotiations with the Southern Utes to move, the belief by the Commissioner of Indian Affairs of a duty to keep white people off the "reservation," [5] the Act of 1888, and the Act of 1895 providing additional compensation for the Southern Utes [6] and requiring their approval.[7] The evidence weighed "substantially in favor of the Commission's interpretation." The Government's conduct, the Court of Claims said, evidenced a recognition that "by its protracted acquiescence in the Southern Ute occupation, Government rights to the land had somehow lapsed, or the agreement not been executed for so long a time, was rescinded and dead." 423 F. 2d, at 356.

> "Hence we find section 5 of the 1895 agreement to be an explicit waiver of the Government's rights created in the 1880 agreement, whatever they were. It follows then that the Southern Ute lands in controversy were ceded in 1895 not 1880." *Ibid.*

This holding was supported also by the language employed by the Secretary of the Interior in the Restoration of 1938.[8]

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[5] Note 4, *supra*.

[6] The treaty of 1880 required that the proceeds from sales of *all* land ceded under that agreement must be credited to the benefit of all Utes. To credit the money received only to the account of Southern Utes would be a violation of the treaty if the land was ceded in 1880.

[7] If the land had been ceded under the 1880 agreement, acceptance of the Act of 1895 was completely unnecessary.

[8] "Thus, defendant's officials do not only concede that the lands were ceded in 1895, but they also enlighten us as to the status it retrospectively applied to the 1880 agreement. Such a statement by an executive agency bearing on the meaning of a treaty must be accorded great weight." 423 F. 2d, at 356.

Since the Southern Ute land was not ceded in 1880, any claims involving that land were beyond the mandate of the Jurisdictional Act of 1909 and improvidently heard in 1910. Likewise the 1950 judgment was no bar. Neither party had intended it to apply to Royce Area 617. If the intention of the parties was irrelevant, the stipulation on its face would not apply to "areas not effectively ceded." 423 F. 2d, at 358.

This Court now reviews those findings and reverses. In doing so it simply remarshalls the evidence for the new result, ignoring the limits of this Court's appellate jurisdiction over the Court of Claims. The question present is either a question of fact or, at best, a mixed question of law and fact and the determination of the Court of Claims is binding on this court if its supported by *substantial* evidence. *United States* v. *Swift & Co.*, 270 U. S. 124, 138; *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275, 281. The result below is clearly supported. It is not the function of this Court to conduct a trial *de novo* on the issues. *United States* v. *Felin & Co.*, 334 U. S. 624, 650 (Jackson, dissenting); *United States* v. *Penn. Mfg. Co.*, 337 U. S. 198, 207 n. 4.

I would affirm the judgment of the Court of Claims.